Supreme Court, U.S.
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No. 04-

IN THE
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P., *et al.*,
Petitioners,

v.

WAYNE SMITH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in holding – contrary to decisions of this Court and the Third and Tenth Circuits – that a settlement class cannot be certified as a matter of law when the class could not be certified for litigation.

2. Whether the Seventh Circuit erred in holding – contrary to decisions of the Third and Tenth Circuits – that a settlement class representative cannot satisfy the "adequacy" requirement of Rule 23(a) as a matter of law when the class includes members of already-certified litigation classes.

PARTIES TO THE PROCEEDING

Petitioners are Sprint Communications Company L.P., Qwest Communications Corporation, Level 3 Communications L.L.C., and WilTel Communications, L.L.C. Petitioners were defendants in the district court and appellees in the court of appeals.

Respondents are Chem-Tronics, Inc., Daniel R. Buhl, Joe C. Meighan, Charles W. Hord, and Joy Pratt Hord. Respondents were intervenors in the trial court and appellants in the court of appeals.

Respondents "by rule" under Rule 12.6 of the Rules of this Court are Wayne Smith and all others similarly situated, who were plaintiffs in the district court and appellees in the court of appeals. Numerous intervenors in the district court did not appeal.

RULE 29.6 DISCLOSURE

Sprint Communications Company L.P. is a Delaware limited partnership. Its partners are US Telecom, Inc., UCOM, Inc.; UTELCOM, Inc.; and Sprint International Communications Corporation. Sprint International Communications Corporation is wholly-owned by UTELCOM, Inc.; US Telecom, Inc., UCOM, Inc.; and UTELCOM, Inc. are wholly-owned by Sprint Corporation. No publicly held company owns ten percent or more of the stock of Sprint Corporation.

Qwest Communications Corporation is a wholly-owned subsidiary of Qwest Services Corporation, which is a wholly-owned subsidiary of Qwest Communications International Inc. No publicly held company owns ten percent or more of the stock of Qwest Communications International Inc.

Level 3 Communications, Inc. is the parent corporation of Level 3 Communications L.L.C. No publicly held company owns ten percent or more of the stock of Level 3 Communications, Inc.

WilTel Communications Group, Inc. is the sole member of WilTel Communications, LLC. Baldwin Enterprises, Inc. owns 100% of the stock of WilTel Communications Group, Inc. Leucadia National Corp., a publicly held company, owns 100% of the stock of Baldwin Enterprises, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Sprint Communications Company L.P., Qwest Communications Corporation, Level 3 Communications L.L.C., and WilTel Communications L.L.C. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 387 F.3d 612 and is reprinted in the Appendix ("App.") at 1a. The order of the Seventh Circuit denying rehearing and rehearing en banc is reprinted at App. 32a. The opinion of the district court, unreported, is reprinted at App. 12a.

JURISDICTION

The court of appeals' opinion was issued on October 19, 2004. A timely petition for rehearing and rehearing en banc was denied on December 13, 2004. App. 33a. Justice Stevens granted an application to extend the time in which to file a petition for a writ of certiorari until April 13, 2005. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 1367. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

The text of Federal Rule of Civil Procedure 23 is reprinted at App. 34a.

STATEMENT OF THE CASE

This case is about the authority of parties and courts to reach fair and practical resolutions of highly complex, multiparty, nationwide commercial litigation. The district court below certified a nationwide class action as a means of settling 42 cases pending in 32 state and federal courts involving 36,000 miles of railroad rights of way. The settlement agreement was reached after years of litigation and months

of negotiation, which involved all affected parties and included numerous modifications demanded by the district court, in the course of a months-long review and approval process, to ensure the settlement's fairness to all class members.

In a 2-1 opinion that misconstrues this Court's decisions and conflicts with the decisions of other federal circuits, a Seventh Circuit panel (Judge Cudahy dissenting) reversed the settlement class certification, effectively unwinding the successful resolution of this complex dispute. The Seventh Circuit's decision does not address the district court's specific findings on the requirements of Federal Rule of Civil Procedure 23, much less give those findings the deference they are owed under this Court's precedents. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). Rather, the decision announces a blanket rule, which not only reverses the class certification order in this case, but will in practice effectively strip all federal district courts in the Seventh Circuit of the power to certify nationwide classes of plaintiffs for purposes of reaching a conclusive settlement of common-law property and contract claims. Though couched in the language of Rule 23, the decision below disregards the commands of the rule, supplanting it with a conclusive legal presumption that a nationwide *settlement* class cannot be certified – as a matter of law – where a nationwide *litigation* class cannot be certified. The decision also holds that the named plaintiffs of a nationwide settlement class cannot – as a matter of law – adequately represent the interests of the class if statewide litigation classes are already pending. Because such circumstances exist in nearly all multi-plaintiff commercial actions of any notable size and complexity, the decision below will likely have the practical effect of derailing any attempt within the Seventh Circuit to resolve complex nationwide disputes without competitive, conflicting and costly state-by-state litigation.

As noted in Judge Cudahy's dissent below and in the opinions of other circuits affirming settlement class certifications in materially identical circumstances, the answer to concerns of conflict and fairness in nationwide class settlements lies not in a categorical rule precluding such settlements, but in the plain language and policies of Rule 23, which authorizes district courts to certify classes that assert sufficiently homogenous claims, and to approve classwide settlements after careful inquiry into the structural and substantive fairness of the settlement to all class members. The district court in this case engaged in painstaking scrutiny of the proposed settlement, requiring repeated revisions of the agreement, designed to ensure that class members with comparatively stronger claims received proportionally higher shares of recovery. Under this Court's precedents, the court of appeals should have deferred to the district court's expertise and judgment in concluding that all class members were adequately represented and ultimately approving the settlement as fair. The court of appeals did not defer – because it incorrectly construed both Rule 23's requirements and the precedents of this Court. Certiorari should be granted.

A. General Background

Petitioners are four telecommunications companies and parties to the settlement agreement underlying this petition: Sprint Communications Company L.P.; Qwest Communications Corporation; Level 3 Communications L.L.C.; and WilTel Communications, L.L.C. Beginning in the 1980s, Sprint and the other petitioners purchased easements or licenses from over 50 railroads. Petitioners then constructed substantial portions of their fiber-optic networks in the railroads' rights of way. This was consistent with a century-old practice of installing first telegraph lines, then electrical cable, and now fiber-optic cable in railroad rights of way to provide telecommunications service. *See generally* Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles:*

Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries, 27 Ecology L.Q. 351 (2000). The new cables were designed to provide long-distance telephone service following the breakup of the AT&T monopoly and to lay the groundwork for high-speed internet service. These cables have since become a vital part of the national telecommunication grid, the national economy, and the national security infrastructure. App. 5a (Cudahy, J., dissenting).

Over the last three decades, dozens of class actions have been filed in various state and federal courts against the petitioners by owners of land adjacent to the railroads' rights of way. The complaints allege that, in some portions of the rights of way, the railroads own easements rather than fee simple interests; that the easements do not authorize telecommunications use; and that the non-consenting landowners are entitled to compensation for the unauthorized use of the rights of way by telecommunications companies. Plaintiffs in these actions have alleged millions of dollars in damages and, in some instances, sought to have the fiber-optic cables – the very bloodlines of the national telecommunications grid – stripped out of their physical beds.

B. The Settlement Negotiations

One of these actions was filed in June 1999 against Sprint and Union Pacific Railroad Company in the Northern District of Illinois The parties entered into global settlement negotiations – implicating all the various actions – in the fall of 2000. At the time, the group of 26 law firms headed by Heins, Mills & Olson, P.L.C. ("Heins group"), represented plaintiffs in 15 fiber-optic right of way cases pending in nine different states, and had been jointly prosecuting those actions over a two-year period. By the time counsel for MCI (which was a settling defendant until its bankruptcy filing in July 2002) approached the Heins group about settlement, statewide class certification motions were pending in cases

the group had commenced in Wisconsin, Missouri, Illinois and Kansas, 22 depositions had been taken, and the Heins group had expended more than 20,000 hours of attorney and paralegal time to that effort. Heins Aff. ¶ 2 (Oct. 3, 2002); Heins Aff. ¶ 10-11, 13, 16, 21 (Sep. 3, 2002); Mills Aff. ¶ 1 (Oct. 10, 2003). In September 2002, the parties reached a comprehensive settlement agreement, and filed an initial Motion for Preliminary Approval and a Motion for Injunction of Competing Claims.

C. The Lengthy Judicial Approval Process

In response to the motion for approval of the agreement, the district court entered a scheduling order that provided for two months of discovery and permitted intervenors to file briefs in opposition to the settling parties' motions.

1. *Intervenors' Objections*

The principal respondents in this Court are five plaintiffs – appellants in the decision below – who intervened to object to the settlement and injunction. The "Tennessee Intervenors" are four landowners with two statewide litigation class actions certified and pending in Tennessee state court – one against Sprint (*Buhl/Meighan v. Sprint*) and the other against Qwest (*Hord v. Qwest*). *See Meighan v. U.S. Sprint Communs.*, 924 S.W.2d 632 (Tenn. 1996); *Buhl v. U.S. Sprint Communs. Co.*, 840 S.W.2d 904 (Tenn. 1992); *Hord v. Qwest Communs. Int'l, Inc.*, No. 40084 (Tenn. Cir. Ct. 2000) (Order Determining Action to be Maintained As a Class Action). The "Kansas Intervenor" is Chem-Tronics, which had a certified litigation class action pending in Kansas state court against Sprint. The class was a Kansas-only class and excluded persons whose property adjoins federal land grant rights of way.

The settling parties and intervenors engaged in extensive discovery. The settling parties produced thousands of documents to intervenors. They also conducted 18 depositions,

including seven of expert witnesses, all of which were attended by the court-appointed Special Master or one of his associates. *See* Third Report of the Special Master (Jun. 27, 2003).

The intervenors sought to establish that the settlement agreement was the product of an objectionable "reverse auction," prominently described by Judge Posner as the "practice whereby the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002). The magistrate judge reviewed the evidence and found it "clear that the situation here is not remotely like that of the *Reynolds* case," and that there was no evidence to "support an inference of collusion." Mem. Op. Regarding Intervenors' Mot. for Discovery of Settlement Negotiations at 5, 9 (Nov. 19, 2002) (App. 25a, 29a). Specifically, the magistrate noted the absence of any evidence that the defendants "solicited demands from different plaintiffs' groups in an effort to play them off against each other." App. 29a. "On the contrary, the Intervenors' counsel was the one who approached the Settling Defendants and made specific proposals that were rejected." *Id.* at 29a-30a. To ensure that there was no further basis for intervenors' reverse auction claim, the magistrate ordered the settling parties to provide the Special Master with documents exchanged between counsel for the settling parties between April 1, 2001 and September 4, 2001. The Special Master reviewed the documents and found that they "evidence significant disagreement, rewriting and compromise in the language of the Settlement Agreement," and "vigorous advocacy by both defendants' counsel and proposed plaintiffs' class counsel." Report of Special Master at 4 (Jan. 3, 2003) (App. 45a). "Nothing within the [negotiation] documents," the Special Master concluded, reflected "'evidence' of a reverse auction." *Id.*

The magistrate judge overruled intervenors' objections to the Special Master's report. The district court affirmed the findings of the Special Master and the magistrate.

2. *Judicial Modifications*

The initial September 2002 settlement agreement called for an average payment, before attorneys' fees, of $.75 per linear foot of right of way. The initial linear foot amount was subject to certain adjustments. These included an adjustment based upon assessments of the relative strength of class members' claims in each state. The assessment was to be made by independent real property law experts selected by the parties and approved by the district court. *Id.* The settlement was valued at more than $140 million, plus millions of dollars more in administrative costs born by the settling defendants. Dist. Ct. Order, Jan. 27, 2004, at 3. Class members were not required to submit proof of title to the right of way in order to make a qualified claim.

In March 2003, the district court informed the settling parties that it was not likely to approve the settlement agreement unless it were restructured to provide a two-tiered payment system, under which a class member who has a higher probability of demonstrating that the railroad does not own fee title to the adjacent right of way would be paid more than a class member who has a relatively low probability of making such a showing. The settling parties then commenced re-negotiation of the agreement. Three months later, the parties submitted a motion for preliminary approval of an amended settlement agreement that took into account the district court's suggestions.

At yet a third hearing on the settlement in July 2003, the district court again indicated that it was not inclined to approve the amended agreement unless several additional changes were made. The Second Amended Agreement – the final agreement between the parties – addressed the district court's concerns. The final settlement, proposed in July

2003, covers approximately 36,000 miles of right of way. The settling parties submitted evidence indicating that the railroads own approximately 75% of their rights of way in fee. Based upon that estimate, the total amount that settling defendants may be required to pay for qualified claims and attorneys' fees exceeds $142 million. In addition to paying for qualified claims and attorneys' fees, the agreement requires the settling defendants to identify and provide mailed notice to all persons who currently own property adjacent to the cable side of those rights of way. Defendants have now substantially completed the process of identifying landowners, at a cost of approximately $11.7 million.

On July 25, 2003 – ten months after the settling parties filed their initial motions for preliminary approval and injunctions against competing claims, and after extensive hearings to address the concerns of the intervenors – the district court entered orders granting conditional certification of a settlement class, granting preliminary approval of the Second Amended Settlement Agreement ("Settlement Agreement"), and granting an injunction against competing class action claims.

D. A Divided Seventh Circuit Panel Reverses

Dozens of individual plaintiffs originally intervened to object to the original settlement below, but following the modification proposed by the district court, only the four *Buhl/Meigan* intervenors from Tennessee and Chem-Tronics from Kansas appealed. A divided Seventh Circuit panel vacated the district court's certification of the settlement class and injunction against competing class actions. The panel majority held that the intervenors were inadequately represented by the settling plaintiffs.

1. The majority found that the settling plaintiffs were inadequate representatives because they were effectively "disarmed," as this Court had concluded with respect to the settling plaintiffs in *Amchem Prods., Inc. v. Windsor*, 521 U.S.

591, 621 (1997). App. 4a. Whereas intervenors had obtained statewide class certifications in the Tennessee and Kansas actions, the settling plaintiffs represented a nationwide class that had not been certified for trial. *Id.* Nor could such a class *ever* be certified, the majority ruled, citing *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681-82 (7th Cir. 2001). App. 4a. The majority concluded that the "nationwide class plaintiffs thus entered negotiations in what the *Amchem* court describes as a 'disarmed' state, unable to 'use the threat of litigation to press for a better offer' – not a good position from which to represent the interests of parties that do wield such a threat." *Id.* (quoting *Amchem*, 521 U.S. at 621).

The majority was unmoved by the fact that the settlement expressly provided for a system of adjustments to class member recoveries to reflect the relative strength of claims under different states' laws. Such fairness adjustments in a settlement, the court held, cannot "substitute" for the "structural assurance of fair and adequate representation" that Rule 23 provides. *Id.*

2. Judge Cudahy dissented. In his view, the majority opinion "entirely lost sight of the benefits of the federal court settlement that has been successfully negotiated here." *Id.* at 5a.

> The development involved here is the laying of a 36,000-mile network of transcontinental fiber-optic cables crossing many states to provide a national telecommunications grid. This installation of fiber-optic cables becomes part of the national communications infrastructure, having an important value for the national economy as well as for national security. Obviously, to the extent uniformity in treatment of affected landowners can be achieved, legal costs and costs of administration (ultimately charged to telecommunications users) can be reduced.

Id. In contrast to these benefits of a comprehensive resolution of the disputed right-of-way issues, Judge Cudahy observed, "[t]he state-by-state treatment favored by the majority is likely to produce a nightmare of complexity, the inequitable treatment of landowners in different states and increased charges to telephone users everywhere." *Id.*

Judge Cudahy explained that the majority erred in finding the settling plaintiffs to be "disarmed" and thus inadequate representatives under *Amchem* because, unlike the settling plaintiffs in *Amchem*, the plaintiffs in this case actually wielded enormous settlement leverage over the defendants. In *Amchem*, the rejected settlement class encompassed *future* claims, which concededly posed no present litigation threat to the defendants, and were not likely to be pursued by the named plaintiffs in the absence of settlement. Because they wielded no live, material threat of litigation, plaintiffs seeking to settle future claims were effectively "disarmed" and thus inadequate representatives of the as-yet-nonexistent future claimants. *Amchem*, 521 U.S. at 600-01, 621; *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 638 (3d Cir. 1996) (Wellford, J., concurring). In Judge Cudahy's words, the *Amchem* plaintiffs wielded the threat of nothing more than "mere speculation about the possibility of filing future actions." App. 7a.

"In stark contrast," Judge Cudahy noted, counsel for the settling plaintiffs "could exert enormous [settlement] leverage over the defendants, since the alternative to settlement for the defendants is to spend years litigating the case in many different state court venues," which according to intervenors could result in even higher damage awards. *Id.* (stating that plaintiffs threatened petitioners with "expensive and lengthy chaos in the various states that the fiber-optic cable has traversed"). Thus, "[f]ar from being the classic disarmed counsel, these counsel have the fabled weapons of mass destruction." *Id.*; *see also id.* at 10a (observing that "class

counsel were anything but disarmed but could constantly wield the threat of a disorderly recourse to state litigation").

Judge Cudahy also rejected the majority's conclusion that Rule 23 had not been and could not be satisfied in this case. The district court specifically found that all the requirements of Rule 23 were satisfied, Judge Cudahy noted, and the majority opinion made no effort – beyond its categorical rejection of settlement class certification in this context – to explain why the district court abused its discretion in making those findings. *Id.* at 8a-9a. Because the class was properly certified under Rule 23(a) and (b), and the settlement was properly approved under Rule 23(e) as fair to all class members, Judge Cudahy concluded that the district court's judgment should have been affirmed.

3. A timely petition for rehearing and rehearing en banc was denied. This petition followed.

REASONS FOR GRANTING THE WRIT

The comprehensive settlement agreement in this case, resolving dozens of fiber-optic right of way cases, was reached after years of litigation, months of negotiation, substantial input from objecting intervenors, over 1,000 hours of work by a Special Master appointed to assist the district court in managing settlement-related discovery and assessing the fairness of the agreement, and active participation and revision by magistrate and district judges in reaching the final terms of the settlement. The agreement seeks to end the decades-long dispute over the laying of fiber-optic cables in 48 states, and to do so by providing fair compensation to property owners without embroiling the affected parties in interminable litigation and possibly even disrupting the physical structure of the national telecommunications grid.

The Seventh Circuit reversed the class certification that facilitated the settlement on grounds applicable in virtually any case of similar nationwide scope and complexity: 1)

because a nationwide *litigation* class could not be certified, a nationwide *settlement* class is categorically impermissible, and 2) because individual state litigation classes had already been certified, the settling plaintiffs were necessarily "inadequate," again categorically precluding certification of the settlement class. Each aspect of the majority's holding conflicts with the key precedents of this Court, the decisions of other circuits, and is wrong as matter of law, logic and policy. Certiorari should be granted and the judgment should be reversed.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

The decision below conflicts with the decisions of this Court and of the Third and Tenth Circuit, in two distinct but related respects. *First*, the decision erroneously holds that certification of a settlement class is categorically impermissible where the same class could not be certified for litigation. That holding squarely conflicts with *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516 (3d Cir. 2004); and *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180 (10th Cir. 2002). *Second*, the decision below erroneously holds that a settling plaintiff is *necessarily* "inadequate" under Rule 23(a) when the proposed settlement class includes representatives of already certified statewide litigation classes. That holding also conflicts with *Amchem*, *Warfarin*, and *Rutter & Wilbanks*, as well as *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and the decisions of other circuits establishing the standards for evaluating a plaintiff's "adequacy" for purposes of Rule 23(a).

A. The Majority's Holding That A Settlement Class May Be Certified Only Where A Litigation Class Could Be Certified Conflicts With Decisions Of This Court And Other Circuits

This Court held in *Amchem* that a court may not ignore the requirements of Rule 23 and certify a class solely because certification is limited to settlement purposes. The Court disagreed, however, with the Third Circuit's conclusion that those requirements "must be satisfied without taking into account the settlement." *Id.* at 619 (internal citations omitted). Instead, the Court held that "settlement is relevant to class certification," *id.*, that "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems," *id.* at 620, and that the Third Circuit "should have acknowledged that settlement is a factor in the calculus" by which it determined the propriety of class certification, *id.* at 622.

The Seventh Circuit majority acknowledged these principles, App. 3a-4a, but its decision leaves no room for treating a settlement class differently from a litigation class in any respect. Instead, the majority concluded that class representatives are *necessarily* disarmed in negotiating a settlement on behalf of a class that cannot be certified for litigation purposes. *Id.* at 4a. Because under the majority's reasoning a disarmed representative is a conclusively inadequate representative, the majority's conclusion flatly precludes certification of a class for settlement purposes unless it can also be certified for litigation purposes. That result contradicts *Amchem* and decisions from other circuits.

Amchem's ruling that settlement must be taken into account in deciding whether to certify a class means that, contrary to the decision below, there *are* classes that can be certified for settlement but not for litigation purposes. The Seventh Circuit therefore should have considered, as the district

court did,[1] whether the concerns that led the court of appeals previously to decide that "[t]his is a nightmare of a class action," *Isaacs*, 261 F.3d at 682, were related to manageability or otherwise obviated by the settlement. Other courts of appeal have undertaken that precise analysis when presented with similar questions, and have concluded that certification of the settlement class is entirely appropriate.

In re Warfarin Sodium Antitrust Litig., 391 F.3d 516 (3d Cir. 2004), involved a nationwide settlement class that included consumers and third-party payors who asserted claims under the consumer fraud and deceptive practices statutes of all fifty states and the District of Columbia. Under Third Circuit precedent, certification of such a class for litigation purposes was, at best, highly unlikely. *See In re LifeUSA Holding*, 242 F.3d 136, 147 (3d Cir. 2001); *Georgine*, 83 F.3d at 630, *aff'd*, *Amchem*, 521 U.S. 591. The court recognized that "there is a significant risk that such a class would create intractable management problems if it were to become a litigation class, and therefore be decertified." *Warfarin*, 391 F.3d at 537. The court, however, resisted objectors' urging to conclude that, because the class could not be certified for litigation purposes, it also could not be certified for settlement. *Id.* at 529. Instead, the court undertook a careful analysis of the district court's conclusion that the concerns objectors raised went to manageability or were otherwise insufficient to defeat certification in the settlement context. Based on that analysis, the court of appeals ruled that "the District Court was well within its discretion" to certify the settlement class. *Id.* at 530.

The Tenth Circuit has likewise concluded that the inability to obtain certification as a litigation class does not pre-

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[1] The district court concluded: "In light of the agreement to settle the Action and the resulting elimination of individual issues that may otherwise have precluded certification of a class, the prerequisites [of Rule 23] are satisfied." Preliminary Approval Order, ¶ 3 (App. 13a).

clude certification as a settlement class. In *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180 (10th Cir. 2002), the district court had twice denied class certification for litigation purposes "because the court determined that the alleged class members' interests were too divergent." *Id.* at 1183. The claims later certified for class settlement "were largely identical to those claims" for which class treatment had previously been denied. The Tenth Circuit rejected objectors' argument that the prior denials of class certification supported "an inference of collusion." *Id.* at 1189 n.5. Instead of concluding that the class representatives were necessarily disarmed by the district court's previous orders, the Tenth Circuit considered whether the division of the class into subgroups resolved any representational deficiencies. *Id.* Concluding that it did, the Tenth Circuit affirmed.

The Seventh Circuit's decision that a settlement class may not be certified in a case where a litigation class would be inappropriate directly conflicts with this Court's decision in *Amchem*, and the decisions of the Third Circuit in *Warfarin* and the Tenth Circuit in *Rutter & Willbanks*. *See also* Alba Conte & Herbert Newberg, 4 *Newberg on Class Actions* § 11:27, at 56-57 & n.40 (collecting district court decisions "that have denied a class for litigation purposes [and] subsequently approved [the same] classes for settlement purposes"). This Court should grant certiorari to resolve this conflict.

B. The Majority's Holding That A Settling Plaintiff Is Necessarily An Inadequate Representative Of Class Members With Pending Statewide Litigation Classes Conflicts With Decisions Of This Court And Other Circuits

The Seventh Circuit's rejection of the class certification and nationwide settlement in this case rests on this Court's reference in *Amchem* to "disarmed" class representatives. App. 4a. According to the panel majority, a settling plaintiff is necessarily "disarmed" compared to class members with

pending statewide litigation classes, and is thus a conclusively "inadequate" class representative under Rule 23(a).

The Seventh Circuit not only misconstrues the reference to "disarmed" plaintiffs in *Amchem*, but applies the reference to reach a result quite *opposite* the core holding of *Amchem* itself, and quite contrary to the decisions of other circuits addressing the adequacy of settlement class representatives.

1. As Judge Cudahy's dissent explains, this Court's reference in *Amchem* to "disarmed" (and thus presumptively inadequate) plaintiffs described a type of plaintiff that is almost the polar opposite of the settling plaintiffs in this case. The "exposure-only" settlement class in *Amchem* did not wield any viable litigation threat whatsoever: none of the named plaintiffs or class members had pending claims against the defendants; many of the class members did not have any symptoms of illness that would alert them to potential claims; and the record showed that the representatives "clearly conceded" that, "absent the settlement, they did not intend to pursue the claims in the class complaint." *Georgine*, 83 F.3d at 638 (Wellford, J., concurring). *Amchem* thus presented the rare case where attorneys attempted to settle prospective claims that were unlikely to be litigated in nationwide class actions, in statewide class actions, or individually. *See Amchem*, 521 U.S. at 600-01.

"In stark contrast," as Judge Cudahy explained, counsel for the settling plaintiffs in this case "could exert enormous settlement leverage over defendants," because they could threaten them with "expensive and lengthy chaos in the various states that the fiber-optic litigation has traversed." App. 7. Thus, "[f]ar from being the classic disarmed counsel, these counsel have the fabled weapons of mass destruction." *Id.*; *cf. In re Diet Drugs Prods. Liab. Litig.*, 2000 WL 1222042, at *45 (E.D. Pa. Aug. 28, 2000) (concluding that class counsel was not disarmed in nationwide settlement negotiations due to "threat of imminent and ongoing litigation," where certified state and MDL litigation classes were pend-

ing and thousands of individual actions were proceeding through discovery); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 349 (1999) (class counsel not "disarmed" under *Amchem* "*if* they retained a credible trial threat in that or another jurisdiction, either in some aggregative capacity or through repeated individual trials"). The decision below thus errs fundamentally in treating the settling plaintiffs in this case as equivalent to the settling plaintiffs in *Amchem*.

2. Still more important, however, the Seventh Circuit's reliance on *Amchem*'s reference to "disarmed" class representatives ignores the context of the reference, and thus misapprehends its true legal significance. As the full context of the Court's reference reveals, its purpose is merely to illuminate the issue that actually matters in the adequacy of representation inquiry, *viz.*, whether there is an arm's length bargaining relationship between the class representative and the defendants that is free of any conflicts of interest. If the class representative has no real case against the defendant absent the settlement, *collusion* – the real problem – is all the more likely:

> [I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, *see* Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1379-1380 (1995), and the court would face a bargain proffered for its approval without benefit of adversarial investigation, *see, e.g.*, *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (CA7 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (parties "may even put one over on the court, in a staged performance").

Id. at 621. Thus, the *Amchem* Court recognized that without an adversarial, arms-length bargaining process between the parties, courts could not ensure that absent parties were adequately protected by the class representatives. *Id.*; *cf.* Issacharoff, *supra*, at 388 ("class counsel are necessarily 'disarmed,' as defined by *Amchem*, where the sine qua non of their representation of the class is their selection by the opposing party or the acquiescence of that party").

The Court reaffirmed this understanding of "disarmed" plaintiffs – and their relevance to adequate representation in the settlement class context – in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). As in *Amchem*, defense counsel initiated negotiations with plaintiffs' lawyers that they selected to discuss a settlement that would resolve all future (but not pending) asbestos claims. *See id.* at 823-24. In the course of holding that settlement value was a poor indicator of whether the mandatory class at issue warranted limited-fund treatment under Rule 23(b)(1), the Court elaborated upon *Amchem*'s discussion of the conflicts that may arise and disarm a class for purposes of Rule 23(a)(4). The settlement negotiations, the Court noted, did not involve "arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation." *Id.* at 852. Rather, "the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims, the full payment of which was contingent on a successful global settlement agreement or the successful resolution of the insurance coverage dispute." *Id.* (internal citation omitted). The formation and structure of this contingent agreement, the Court noted, almost necessarily ensures an impermissible conflict that renders the class representatives disarmed and thus inadequate: "The resulting incentive to favor the known plaintiffs in the earlier settlement was, indeed, an egregious example of the conflict noted in *Amchem* resulting from divergent interests of the presently injured and future claimants." *Id.* at 852; *see*

also id. ("Side settlements suggest that class counsel has been laboring under an impermissible conflict of interest and that it may have preferred the interests of current clients to those of the future claimants in the settlement class" (quoting Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 832 (1995))).

The principles set forth in *Amchem* and *Ortiz* thus make plain that, just as in the litigation class context, the Rule 23 adequacy of representation inquiry in the settlement class context must focus on whether there is an impermissible conflict of interest or collusion between the representatives and defense counsel. *See also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 397-98 (1996) (Ginsburg, J., joined by Stevens and Souter, JJ., concurring in relevant part) ("An adequate representative . . . vigorously prosecuting an action without conflict and bargaining at arms-length, may present different facts and a different settlement proposal to the court than would an inadequate representative."); 7A Charles Alan Wright et al., *Fed. Prac. & Proc.* § 1768, at 394 (3d ed. 2005) ("It therefore is obvious that a trial court must scrutinize carefully the party's claim to representative status as well as the party's relationship to other class members and to the opposing party to assure absent members that there is neither conflict nor collusion."). To be sure, the fact of the settlement – particularly the settlement negotiation process – makes concerns about conflict and collusion particularly acute. *See Ortiz*, 527 U.S. at 852. But that fact does not override the basic Rule 23 requirement that the court must find *actual conflict or collusion* before holding that class representatives are "disarmed" and thus inadequate.[2]

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[2] Moreover, this case differs dramatically from *Amchem* and other mass tort class actions that "provide enormous potential for collusive arrangements, particularly when future claimants are involved as they exacerbate conflict of interest problems between the attorneys and the plaintiff class and the class members themselves." 7B Wright, et al.,

Indeed, the decision below violates *Amchem*'s core holding, *viz.*, that a court *cannot* base its class certification decision solely on the fact that the case has been settled. In this case, the district court specifically found all the requirements of Rule 23 satisfied. App. 9a. As Judge Cudahy summarized those findings:

> In the present case, there are no disparate personal injuries. Plaintiffs' and all class members' claims arise from defendant's installation and maintenance of fiber-optic cable on railroad rights of way. Any harm rising from that installation has occurred and is capable of being ascertained. All class members also raise the same legal claims. Therefore the class has sufficient unity for settlement class certification purposes.

Id. at 8a. The panel majority did not respond directly, or suggest in any way how or why any specific requirement of Rule 23 was not satisfied in this case. Instead, the majority concluded that, because the case cannot be certified for litigation purposes, certification of a settlement class was also inappropriate. In other words, the majority opinion effectively disavowed the need to decide whether the class in this case *actually* satisfied the specific requirements of Rule 23 principally *because* the case was certified for settlement alone.

But *Amchem* does not suggest that courts should hold the fact of settlement *against* the certification of a class. To the contrary, the Court expressly rejected such a rule, as dis-

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Fed. Prac. & Proc. § 1797.3, at 160 n.2; *see generally* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 Harv. L. Rev. 747, 750-51 (2002) (discussing the differences between mass tort settlements and other class actions, and the controversies surrounding the former); John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1442 (1995) (noting that the "mass tort context exacerbates [conflicts of interest] to a unique degree").

cussed above, *supra* at 13. By holding that settling plaintiffs are conclusively inadequate class representatives when individual statewide classes have been or could be certified – thereby eschewing the need for rigorous scrutiny of Rule 23's actual requirements – the Seventh Circuit has run afoul of *Amchem*'s basic teaching that the existence of a settlement *vel non* should not solely determine the outcome of the Rule 23 analysis.

3. That ruling also conflicts with decisions of the Third and Tenth Circuits in cases involving settlement class certifications, including the *Rutter & Wilbanks* and *Warfarin* cases discussed above.

In *Rutter & Wilbanks*, the Tenth Circuit affirmed the district court's certification of a $70 million settlement class over the adequacy-based objections of representatives of a similar ongoing class action in Texas state court. 314 F.3d at 1189. The court expressly rejected the objectors' contention that the settling plaintiffs were inadequate representatives because of an inherent conflict of interest with the members of the already-certified Texas litigation class. *Id.* at 1188 (citing *Amchem*, 521 U.S. at 627). In particular, the court rejected a "reverse auction" argument – identical to the argument advanced by intervenors here – that the settlement agreement was "collusive" and "designed to undercut the competing Texas class actions." *Id.* at 1189. Absent concrete evidence of collusion, the Tenth Circuit held, accepting the objectors' reverse-auction claim "would lead to the conclusion that no settlement could ever occur in the circumstances of parallel or multiple class actions" because "none of the competing cases could settle without being accused by another of participating in a collusive reverse auction." *Id.* (internal quotation marks omitted).

Rutter & Wilbanks cannot be reconciled with the decision below. According to the Tenth Circuit, settling plaintiffs cannot be deemed inadequate representatives of class

members in competing class actions unless there is actual, concrete evidence of such conflicting interests as collusion between the settling plaintiffs and the defendants. The Seventh Circuit demands no such showing, but instead conclusively presumes the existence of a conflict from the mere fact that some class members are also members of competing statewide or multi-state litigation classes.

The Seventh Circuit's decision also conflicts with the Third Circuit's decision in *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220 (3d Cir. 2002). In *Diet Drugs*, the Third Circuit held that even though a settlement class might encompass various potential competing subclasses, that fact "does not by itself establish an actual conflict undermining adequacy of representation." *Id.* at 231. Class members who had obtained certification of their own class in a Texas court with state-law based claims (and the potential for treble damages), objected to their inclusion in a national settlement class certified in federal court and attempted to opt out on adequacy of representation and other grounds. The Third Circuit held that the objectors to the class representatives must offer some concrete basis in the evidence to establish a conflict and hence inadequate representation, such as the presence of "trade-offs between the classes," proof that "benefits had been bargained for separately," or the existence of a "conflict between those seeking future benefits and those seeking them immediately." *Id.* Because the district court had made no such findings, the Third Circuit held that "there is no basis on which to find actual conflicts sufficient to establish that [the Texas] plaintiffs were not adequately represented." *Id.*

Similarly, in *Warfarin*, the Third Circuit affirmed a $44.5 million settlement between a defendant pharmaceutical company and a nationwide class of plaintiffs alleging antitrust and consumer fraud claims. The proposed settlement would dismiss all pending "federal MDL proceedings and related

state actions" against the defendant. 391 F.3d at 525. Like intervenors here, the *Warfarin* objectors argued that certification of the settlement class was improper because of differences in the strength of the claims that class members might bring under various state laws; for example, "certain class members may be eligible for treble damages or punitive damages under their state antitrust laws, while other class members, such as those from Tennessee, may be eligible for 'full consideration' damages." *Id.* at 530. The Third Circuit rejected this contention, concluding that "any material variations" in state law rights and remedies "could be considered in the context of calculating damages as well as in assessing the fairness of the settlement." *Id.*

The decision below conflicts with *Diet Drugs* and *Warfarin*, both of which declined to reverse the certification of settlement classes on precisely the grounds cited by the Seventh Circuit, *viz.*, that class members with live litigation classes pose a comparatively stronger threat to defendants than do settling plaintiffs, as do class members in states with laws that create the prospect of comparatively high recovery. Unlike the Seventh Circuit, the Third Circuit clearly holds that such theoretical problems do not pose a categorical bar to settlement class certifications. Under the Third Circuit's view (like the Tenth Circuit's), the inadequacy of settling plaintiffs' representation of class members with competing litigation classes (and arguably stronger claims) is not presumed but must be proved through concrete evidence of an actual conflict of interest or collusion between the settling parties.

Other circuits have also rejected the presumption of inadequacy standard adopted by the Seventh Circuit here. The consensus view is that adequacy of representation is determined through a case-specific inquiry into whether there is evidence of collusion or some other concrete conflict between the interests of the named plaintiffs and those of absent class members. *See James v. City of Dallas*, 254 F.3d

551, 571 (5th Cir. 2001) ("Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests." (quoting *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 625 (5th Cir. 1999))); *Gunnels v. Healthplan Servs.*, 348 F.3d 417, 430 (4th Cir. 2003) ("To defeat the adequacy requirement of Rule 23, a conflict must be more than merely speculative or hypothetical.") (internal quotation marks omitted); *see also Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003); *Station v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). The Seventh Circuit identified nothing of the kind here – indeed, it flatly ignored the district court's finding that there was "no evidence of collusive negotiations in this case." App. 10a (Cudahy, J., dissenting).

The Seventh Circuit also ignored other "important indicia" of the adequacy of this settlement: "the absence of any indication of collusion, the protracted settlement negotiations, the ability and experience of plaintiffs' counsel, the extensive discovery preceding settlement and the fact that counsel for all parties – including the objectors – had access to materials produced in discovery." *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982) (Friendly, J.). Here, before certifying any class, the district court undertook a careful analysis of Rule 23's requirements, actively involving itself, with the assistance of a Magistrate Judge and a Special Master, over a period of months in a review of all aspects of the settlement. Yet rather than undertaking the "undiluted, even heightened" inquiry into whether the requirements of Rule 23 were satisfied, *Amchem*, 521 U.S. at 620, the Seventh Circuit applied a conclusive presumption

rejecting the adequacy of the settling plaintiffs' representation of all class members.[3]

Certiorari should be granted to bring the Seventh Circuit's standard for determining the adequacy of a settlement class representative into line with the prevailing view among other circuits – and the view enunciated in *Amchem* and *Ortiz* – and to clarify for *all* courts the importance of inquiring into *actual* conflicts or collusion in determining whether plaintiffs seeking to settle complex, nationwide commercial litigation adequately represent the interests of the class members subject to the settlement.

II. THE DECISION BELOW IMPLICATES PROCEDURAL AND ECONOMIC ISSUES OF THE HIGHEST IMPORTANCE

This case is unusually important in two respects.

First, the decision below erects a virtually insuperable barrier to the comprehensive resolution of complex, multiparty litigation. This Court has recognized the strong public policies "favoring the settlement of protracted litigation." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 407 (1992); *see generally* 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11:41, at 87 ("[T]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."). The decision below, how-

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[3] The failure to review the district court's actual findings also runs afoul of this Court's instruction that deference is owed to the district court. "The certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court." *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). Because the district court will be intimately familiar with the facts and parties in certification matters, "their judgments are to be reviewed by the Court of Appeals only for abuse of discretion." *Amchem*, 521 U.S. at 630 (Breyer, J., joined by Stevens, J., concurring in part and dissenting in part).

ever, renders it all but impossible to settle the most complicated, protracted categories of litigation – the very context in which the policies favoring settlement should apply most forcefully.

The decision below undermines the settlement of such cases because they so often involve multiple and overlapping class actions, filed in both federal and state courts and in the courts of different states. Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. Rev. 461, 462 (2000) ("dueling class actions – two or more class actions commenced on behalf of the same class or overlapping classes, which present claims arising out of the same transaction or occurrence – are rampant"); 7B Wright et al., *Fed. Prac. & Proc.* § 1798.1, at 231 ("One of the most troubling problems in the modern class-action arena is the filing of multiple, competing class actions in state and federal courts all directed toward the same conduct or activities, which are alleged to have caused harm that is multistate, if not national, in scope.").[4] Because multiple class actions, and actions seeking differing state-law remedies, are ever-present factors in complex, nationwide

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[4] The American Bar Association recently described the prevalence and harm of overlapping federal and state class actions:

> The Task Force early on identified the filing of multiple class actions on the same matters resulting in the pendency of overlapping or competing class actions in a number of courts as one of the most serious concerns with class action practice. Such overlapping class actions consume unnecessary litigation resources, encourage 'gaming' of court filings, and risk inconsistent treatment of like cases. The Judicial Panel Panel on Multi-District Litigation (MDL) permits consolidation of federal cases for pretrial proceedings, and, although a few states have similar devices for cases within their state, no such device exists for consolidating suits in different states.

American Bar Association, Report of the Task Force on Class Action Legislation to the House of Delegates (adopted Feb. 10, 2003) (internal citations omitted).

litigation, a rule holding that such factors necessarily preclude the certification of a nationwide settlement class is tantamount to a rule that such classes may *never* be certified. This in turn is tantamount to a rule that such cases may never be settled in any comprehensive, efficient manner. *See* Manual for Complex Litigation § 30.45 (3d ed. 2003) (stating that settlement classes "facilitate global settlement" and save litigation expenses). This case proves the point: as Judge Cudahy's dissent observes, the majority's rejection of the class certification will force all parties back into "state-by-state" litigation, which is of course "likely to produce a nightmare of complexity" and "inequitable treatment." App. 5a. An approach demanding such needless and costly inefficiencies in the resolution of complex commercial disputes should not be tolerated.

Second, as Judge Cudahy's dissent also explains, the Seventh Circuit adopted its anti-settlement-class approach in an especially inappropriate context: a conflict involving the arteries that give life to our "national communications infrastructure," which has "an important value for the national economy as well as for national security." *Id.* Some of the individual claims seek the physical removal of fiber-optic lines from that infrastructure, and yet the Seventh Circuit effectively forbids a conclusive, comprehensive, fair resolution of such claims. A festering conflict over the legal rights to and the physical status of the Nation's telecommunications arteries serves nobody's interests.

To be clear: petitioners do not contend that the public policy favoring the settlement of disputes should compel a court to ignore the requirements of Rule 23, whether in this crucially important context or in any other. To the contrary, our contention is that Rule 23's requirements *should be followed*, and a nationwide settlement class certified when and where appropriate under that Rule, as it is here. The strong policies favoring settlement, and the importance of conclu-

sively resolving the land-use rights underlying the Nation's telecommunications infrastructure, only further underscore the error in the Seventh Circuit's decision to erect an artificial barrier to the deployment of Rule 23 in the settlement context, as if the Rule were somehow uniquely ill-suited to that context. It is not: Rule 23 was written to promote class actions as a means of achieving "economies of time, effort, and expense, and promoting uniformity of decision as to persons similarly situated." Fed. R. Civ. P. 23, 1966 Adv. Comm. Note; *see Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982) (purpose of class action is to conserve "the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion" (quoting *Califano*, 442 U.S. at 701)). Those purposes plainly are served by the settlement class certification here.

The Seventh Circuit's rule disfavoring settlement class certifications is unsound as a matter of law and unwise as a matter of policy. It should not stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 03-3087, 03-3140, 03-3659 & 03-3660

WAYNE SMITH, LESCO ENTERPRISES, INC., SAN SIMON GIN, INC., GROSS-WILKINSON RANCH CO., REX DOLAN, EVERETT CHAMBERS, AND JOANNE CHAMBERS, on their behalf and all others similarly situated,

Plaintiffs-Appellees,

v.

SPRINT COMMUNICATIONS COMPANY, L.P., QWEST COMMUNICATIONS CORPORATION, LEVEL 3 COMMUNICATIONS, LLC, WILTEL COMMUNICATIONS, LLC, AND UNION PACIFIC RAILROAD COMPANY,

Defendants-Appellees.

APPEALS OF:

CHEM-TRONICS, INC., DANIEL R. BUHL, JOE C. MEIGHAN, JR., CHARLES W. HORD, AND JOY PRATT HORD,

Intervenors.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 3844-**Wayne R. Andersen, Judge**.

ARGUED JANUARY 20, 2004
DECIDED OCTOBER 19, 2004

Before CUDAHY, KANNE, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* In this case, we are asked to review a nationwide class certification, accompanied by an injunction against all competing class actions. The plaintiff class is made up of landowners whose property is subject to railroad rights of way, along which defendant telecommunications companies have installed fiber-optic cables without the landowners' permission. *See generally* Jeffery M. Heftman, Railroad Right-of-Way Easements, Utility Apportionments, and Shifting Technological Realities, 2002 U. Ill. L. Rev. 1401. We reversed certification of a virtually identical class in *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001), observing that differences in state law concerning the scope of the railroads' easements, along with differences in the various deeds themselves, would result in "a nightmare of a class action." This time, though, the class has been certified for settlement only, which the settling parties insist eliminates the complications that made the class uncertifiable in *Isaacs.* The intervening parties-who represent statewide plaintiff classes already certified in Tennessee and Kansas-argue that the class still fails to meet the certification requirements of Fed. R. Civ. P. 23(a) and (b).

Before getting to the matter at hand, we note that this case has had a troubled history. The original complaint was filed in 1999 by certain representative plaintiffs against Sprint Communications and the Union Pacific Railroad, claiming damages for the wrongful installation of fiber-optics cables across their land and seeking class-action status in the district court for the Northern District of Illinois. In 2001 the parties announced that a nationwide settlement was in the works in which all similar claims against Sprint and four other companies not yet named as defendants would be settled. Thereafter, representative class-action plaintiffs in other cases around the country got wind of the deal and intervened in order to object.

After a half a dozen hearings in Chicago, engaging the time of a district judge, a magistrate judge, and a Special Master, the settling parties, apparently not pleased with how things were going in the Windy City because the court seemed to be disinclined to approve the settlement, migrated to the United States district court in Oregon and submitted it there for preliminary approval. In doing so, plaintiff's counsel sent a letter to the judge in Chicago informing him that the settling parties would no longer seek approval of the settlement agreement in the Northern District of Illinois. After one hearing, the Oregon district judge (Judge Ann Aiken), in a decision that hit the nail squarely on its head, dismissed the case on the grounds of "judge shopping." *Zografos v. Qwest Communications Corp.,* 225 F. Supp. 2d 1217, 1223 (July 12, 2002 U.S.D.C.D. Or.). The settling parties then returned to Chicago for another stab at making their deal stick.

The fact that a settlement has been reached is, of course, relevant. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997) (citation omitted). But settlement is not a cure-all: "[The] other specifications of [Rule 23]-those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context." *Id.* These include the requirement that the class representatives' claims be typical of those of the class and that the representatives will adequately protect the class's interests. Fed. R. Civ. P. 23(a)(3), (4). And not just the class as a whole: where there are significant differences among subgroups within the class, "the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *Amchem,*

521 U.S. at 627 (quoting *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721, 743 (2nd Cir. 1992)).

The intervening parties identify several ways in which the settling plaintiffs do not adequately represent the interests of landowners in Tennessee and in Kansas. Those two groups have already been certified as litigation classes in their respective states, and each was on the eve of trial when the district court in Chicago issued its injunction. Additionally, the Tennessee class members have established liability in state court for the taking of their property, *see Buhl v. U.S. Sprint Communications Co.*, 840 S.W.2d 904, 912 (Tenn. 1992), and estimate compensatory damages at approximately ten times greater than the upper limit provided by the proposed nationwide settlement. They have also shown that punitive damages may be available for trespass to their property, *see Meighan v. U.S. Sprint Communications* Co., 924 S.W.2d 632, 641-42 (Tenn. 1996), subject to proof at trial.

The nationwide class, in contrast, has not been and cannot be certified for trial – *see Isaacs*, 261 F.3d at 681-82. The nationwide class plaintiffs thus entered negotiations in what the *Amchem* court describes as a "disarmed" state, unable to "use the threat of litigation to press for a better offer," *Amchem*, 521 U.S. at 621-not a good position from which to represent the interests of parties that do wield such a threat.

The settling parties argue that the intervenors' interests are nevertheless protected. Specifically, the settlement agreement provided that adjustments will be made to the amount of recovery available to landowners in a given state, based on an analysis of that state's law by independent property-law experts. But although that may tend toward a more equitable division of funds, it does not provide the "structural assurance of fair and adequate representation" prior to the settlement itself that Rule 23 demands. *Amchem*, 521 U.S. at 627. Law professors are no substitute for proper class representatives. *Cf. Uhl v. Thoroughbred Tech. &*

Telecomms., Inc., 309 F.3d 978, 987 (7th Cir. 2002); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 185 (2nd Cir. 1987) (disallowing the administration of class funds by independent foundation without judicial oversight).

We agree with the intervenors that they are inadequately represented by the settling plaintiffs.[1] We therefore VACATE the nationwide class certification and the district court's injunction against competing class actions and REMAND the case to the district court for further proceedings. Costs are awarded to the Intervenors.

CUDAHY, *Circuit Judge,* dissenting. It seems to me that the majority has entirely lost sight of the benefits of the federal court settlement that has been successfully negotiated here. The development involved here is the laying of a 36,000-mile network of transcontinental fiber-optic cables crossing many states to provide a national telecommunications grid. This installation of fiber-optic cables becomes part of the national communications infrastructure, having an important value for the national economy as well as for national security. Obviously, to the extent uniformity in treatment of affected landowners can be achieved, legal costs and costs of administration (ultimately charged to telecommunications users) can be reduced. The state-by-state treatment favored by the majority is likely to produce a nightmare of complexity, the inequitable treatment of landowners in different states and increased charges to telephone users everywhere. If a similar approach had been applied to the construction of the first transcontinental railroad, the Pony Express might still be galloping along.

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[1] Our dissenting colleague, in rejecting our approach to this case, observes that if "a similar approach had been applied to the construction of the first transcontinental railroad, the Pony Express might still be galloping along." We doubt that his observation is true but also note that the Pony Express might well be still galloping along if class-action lawyers were on the prowl in the 1830's.

The principal point made by the majority opinion is that the interveners have not been adequately represented, for two reasons: A) class counsel were "disarmed" because no federal class action could be certified for litigation; and B) having law professors make adjustments to the settlement amount based on a state law is no substitute for proper class representation. Both arguments are without merit. The majority's first argument hinges on three assumptions, each of which must be true for the majority's argument to succeed. Unfortunately, each of these three assumptions is at best, unfounded and, at worst, simply incorrect.

First, based on the Supreme Court's holding in *Amchem*, the majority assumes that if class counsel are "disarmed" during the settlement negotiation process, the resulting settlement cannot or should not be approved. *Amchem*, however, does not stand for that proposition and only raises the issue of "disarmed" counsel to explain *one reason* why courts must *consider* commonality and the other requirements of Rule 23(a) and Rule 23(b) even in a settlement class. *See Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 621 (1997) ("[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and the court would be disarmed.").

Second, even if *Amchem* did stand for the proposition that settlements by "disarmed" counsel should not be approved, the majority assumes that class counsel should be considered "disarmed" whenever their class could not be certified for litigation in federal court. In *Amchem*, however, class counsel were "disarmed" not simply because the class could not be certified for litigation in federal court, but because the settlement "exclusively involv[ed] persons outside the MDL Panel's province-plaintiffs *without* already pending lawsuits." *Amchem Prods.,* 521 U.S. at 601 (emphasis added); *see also id.* at 601 n.3 ("It is basic to comprehension of this proceeding to notice that no transferred case is in-

cluded in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL Panel transfer."). Thus, if the class in *Amchem* could not bring a federal class action, it was left with nothing except mere speculation about the possibility of filing future actions. In stark contrast, in the present case there have been 12 years of litigation pending in various state courts, some of which have already decided that punitive damages may be sought. *See, e.g., Meighan v. Sprint*, 924 S.W.2d 632 (Tenn. 1996). Therefore, unlike *Amchem*, in this case, class counsel could exert enormous leverage over the defendants, since the alternative to settlement for the defendants is to spend years litigating the case in many different state court venues, which, according to appellants, might award as much as 3,000 percent more than is being offered in this settlement. *See* Buhl Br. at 23 ("[T]he plaintiffs' proof in *Hord v. Quest* is that compensatory damages will be $15-19 per foot, with punitive damages expected to multiply that figure several times."). Thus, defendants' next best alternative to settlement would *not* be the possibility of *no* litigation at all, as in *Amchem* or as the majority opinion seems to suggest in this case, but expensive and lengthy chaos in the various states that the fiber-optic cable has traversed. Far from being the classic disarmed counsel, these counsel have the fabled weapons of mass destruction.

Finally, even if the majority is correct in its first two assumptions (i.e., *Amchem* means both that (a) settlement by "disarmed" counsel should not be approved; and (b) counsel *must* be considered "disarmed" simply because their class could not be certified for litigation in federal court), the majority would still need to demonstrate that the present class action could not be certified for litigation. The majority assumes this to be so; however, it provides no analysis as to why and pays only lip service to the district court's findings. This is in stark contrast to *Amchem*, in which the Supreme Court went through a detailed analysis of why the class in

that case failed to meet the commonality requirements of Rule 23(a) and (b). *See Amchem Prods.*, 521 U.S. at 622-31.

With respect to commonality, the problems presented in *Amchem* do not apply here. In *Amchem*, cohesion was missing, because the class included members who were exposed to different asbestos-containing products, for different amounts of time, in different ways and over different periods. Some class members suffered no physical injury, some had only asymptomatic pleural changes, others had lung cancer (some of whom were smokers), others disabling asbestosis, and still others mesothelioma-a disease with a latency period of 15 to 40 years. Indeed, as to some class members, it was unclear whether they were ever exposed, and whether they would ever contract an asbestos-related disease and, if so, which one.

In the present case, there are no disparate personal injuries. Plaintiffs' and all class members' claims arise from defendant's installation and maintenance of fiber-optic cable on railroad rights of way. Any harm rising from that installation has occurred and is capable of being ascertained. All class members also raise the same legal claims. Therefore, the class has sufficient unity for settlement class certification purposes.

The majority apparently believes that such rigorous analysis is unnecessary because of this court's one-paragraph disparagement of a related class action in *Isaacs v. Sprint Corporation*. *See* 261 F.3d 679, 682 (7th Cir. 2001). However, in *Isaacs*, we merely found that the district court improperly "certified the case to proceed as a class action before making any of the determinations . . . that Rule 23 makes prerequisite to certification." *Id.* at 682 (emphasis added). Although we suggested that it was "unlikely" that common issues could be found to predominate, we did not rule out this possibility nor did we rule out the possibility that a national class action could be bifurcated or otherwise

made manageable. *Id.* In the present case, unlike *Isaacs*, the district court made the determination that the Rule 23 prerequisites were met prior to certification. Therefore, the dicta of Isaacs do not obviate the need to analyze whether the Rule 23 prerequisites are properly met in this case or require rejection of the district court's conclusions.

The majority's position has the unfortunate effect of insuring that no settlement can ever be entered in federal court in this case, because any proposed class counsel will be considered "disarmed" despite the obvious leverage counsel may wield in practice. The majority thus forfeits the manifest advantages of a national settlement for a national undertaking.

With respect to the second argument (about adjustments to the settlement by experts), the fact that the settlement agreement may require that law professors make adjustments in the settlement amount based on state law has practically no relevance to the issue whether class counsel is adequate. At worst, the adjustment procedure injects some uncertainty into the settlement agreement. If, for instance, the settling parties had the law professors derive the adjustments *ex ante* and included these adjustments in the settlement agreement (thus eliminating the uncertainty), there would be nothing for the majority to complain about. But the mere fact that the settlement agreement contains some uncertainty does not make class counsel inadequate. It cannot even be known at this point to whose benefit the uncertainty will accrue.

It is tempting to look for holes in this settlement agreement, because it appears that the intervenors may now be significantly worse off than they might have been in state court. However, because we are ill-equipped to determine the ultimate fairness of any settlement from a substantive standpoint, our job must be to insure that the process under which it was negotiated and approved was a fair one. *See Amchem Prods.*, 521 U.S. at 621 ("[T]he standards set for the protection of absent class members serve to inhibit ap-

praisals of the chancellor's foot kind-class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness."). Neither the intervenors nor the majority has presented any evidence to challenge the conclusion that the agreement did not arise from a fair bargaining process. To the contrary, after significant study, the magistrate judge found no evidence of collusive negotiations in this case. Supp. App. at A-36. And, of course, the discretion of the district court is entitled to something more than lip service. Where, as here, the district court has addressed fairness in depth, we should be reluctant to disagree.

In any event, this settlement agreement is not unfair on its face. No judgment has been awarded in any state court, so although plaintiffs may find themselves in a strong position, as Yogi Berra once said, the game's not over until its over. While the land use rights in question no doubt have some theoretical value, the only real value comes from the owner's ability to sell his right to the telecommunication companies to lay such cable. Realistically, these landowners were not going to build a retirement cottage lying three feet below the railroad tracks on their property-and, if they were, it is unlikely that this settlement agreement will prevent them from doing so. The point is that it is not for this court to second-guess the value of these rights and then vacate a settlement agreement as unfair.

Hence, I believe that to cast aside a national settlement agreement fairly arrived at, and not substantively unfair on its face, is to imprudently reject the preferred treatment of this nationwide infrastructure, where it seems class counsel were anything but "disarmed" but could constantly wield the threat of a disorderly recourse to state litigation. It is crucially important that the procedures followed here be suited to the emphatically interstate and national character of this important infrastructure development. I therefore respectfully dissent.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

USCA-02-C-0072-10-19-04

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
Smith v. Sprint Communications Company L.P., et al.

Case No. 99 C 3844

Hon. Wayne R. Andersen

ORDER PRELIMINARILY APPROVING SETTLEMENT, CONDITIONALLY CERTIFYING CLASS, AND DIRECTING NOTICE

Counsel for Plaintiffs and Defendants have applied, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for an order (1) certifying a settlement class; (2) preliminarily approving a proposed class settlement on the terms and conditions set forth in the Second Amended and Restated Settlement Agreement dated July 21, 2003 (the "Settlement Agreement"); and (3) approving a program for class notice. Terms capitalized herein and not defined shall have the meanings ascribed to them in the Settlement Agreement. The Court has reviewed and considered all papers filed in connection with such application, including the Settlement Agreement, and all exhibits annexed thereto, and has heard the presentations of counsel appearing with respect thereto. On the basis thereof, and on all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. This Court has jurisdiction of the subject matter of this Action and jurisdiction of the Parties.

2. For settlement purposes only, this action may be maintained as a class action under Rule 23 of the Federal

Rules of Civil Procedure, on behalf of the following class (the "Class"):

> All persons or entities who or which, for any period of time during the Settlement Class Period held fee ownership in real property adjacent to a Right of Way on the Cable Side, or held any interest in real property underlying a Right of Way on the Cable Side.
>
> The Class shall not include Sprint, Qwest, Level 3 or WilTel or their past and present parents, subsidiaries, affiliates, successors, assigns, or any of their directors or officers; the United States of America; any state of the United States, any municipality or county; any foreign nation; any Native American nation or tribe; and any Right of Way Provider or any person controlled by, under the control of, or under common control with any Right of Way Provider.

3. In light of the agreement to settle the Action and the resulting elimination of individual issues that may otherwise have precluded certification of a class, the prerequisites to class certification under Fed. R. Civ. P. 23 (a) are satisfied, to-wit:

a. The Class, consisting of thousands of owners of real property, is so numerous that joinder of all members is impracticable;

b. There are questions of law and fact common to the Class, including the central question of their right to compensation for Settling Defendants' Occupation of Rights of Way with Telecommunications Facilities;

c. The claims of the Plaintiffs are typical of the claims of the Class; and

d. The Plaintiffs, represented by counsel experienced in complex litigation, will fairly and adequately protect the interests of the Class.

In light of the agreement to settle the Action and the resulting elimination of individual issues that may otherwise have precluded certification of a class, the questions of law and fact common to all members of the Class predominate over questions affecting only individual members, and certification of the Class is superior to other available methods for fair and efficient adjudication of this controversy, satisfying Fed. R. Civ. P. 23 (b)(3).

4. Wayne Smith, San Simon Gin, Inc., Gross-Wilkinson Ranch Co., Rex Dolan and Everett Chambers, named as Plaintiffs in the Complaints filed in a consolidated with this action (the "Complaints") are designated as Class representatives. Counsel appearing for these Plaintiffs are designated as Plaintiffs' Class Counsel. In accordance with the Settlement Agreement, Samuel D. Heins of Heins Mills & Olson, P.L.C. is designated and authorized to act as Plaintiffs' Settlement Counsel.

5. The terms and conditions of the proposed Settlement as set forth in the Settlement Agreement, including the provision for substantial cash payments to be trade by the Settling Defendants to Class Members who become Qualified Claimants in return for the Release of Claims and Easement and Right of Way Agreements to be delivered by Class Members, place the Settlement within the range of fair and reasonable settlements, making appropriate further consideration at a hearing held pursuant to notice to the Class.

6. A hearing (the "Settlement Hearing") shall be held approximately ninety (90) days after notice is mailed in accordance with the notice program, before the undersigned at the United States Courthouse, Courtroom 1403, 219 S. Dearborn St., Chicago, Illinois. The exact date of the Settlement Hearing will be set after the members of the Class have been identified, as described in paragraph 8 below, and will be included in the Notice and Summary Notice. The purpose of the Settlement Hearing will be to (a) determine whether the

proposed Settlement is fair, reasonable, and adequate, and should be finally approved, (b) determine whether an order and judgment should be entered dismissing this action and bringing the litigation to a conclusion, (c) consider any application of counsel for an award of attorneys' fees and expenses to counsel, and (d) consider other Settlement-related matters. The Court may adjourn, continue, and reconvene the Settlement Hearing pursuant to oral announcement without further notice to the Class, and the Court may consider and grant final approval of the Settlement, with or without minor modification and without further notice to the Class.

7. The Court appoints Rust Consulting, Inc., of Minneapolis, Minnesota, to serve as Settlement Administrator. The Court, preliminarily and subject to a more complete review of their credentials and qualifications, approves the selection of Prof. Ann M. Burkhardt, of the University of Minnesota Law School and Prof. Susan French, of the University of California Los Angeles Law School, as Real Property Law Experts for the purpose of establishing the state real property law adjustments, set forth in Sections VI.A.7.a and XI.D of the Settlement Agreement. The results of such state real property law adjustments shall be included in the Notice.

8. The Court preliminarily approves as to form the Notice of Class Action, Proposed Settlement, and Settlement Hearing (the "Notice"), and the Summary Notice, attached to the Settlement Agreement as Exhibits B and F, respectively. The Court also approves the method of directing notice to the Class, as set forth in paragraphs 9 and 10 below, and the method by which members of the Class who currently own real property adjacent to a Right of Way on the Cable Side will be identified, as set forth in the parties' Memoranda in Support of the Joint Motion for Preliminary Approval of Settlement, Certification of a Settlement Class, Approval of Notice and Entry of an Injunction Against Prosecution of Settled Claims.

9. Within thirty (30) days after the Settlement Administrator's receipt of all available information identifying members of the Class who currently own real property adjacent to a Right of Way on the Cable Side, the Settlement Administrator shall prepare and cause individual copies of the Notice to be sent by United States mail, first class postage prepaid, to each such identified member of the Class. The Settlement Administrator also shall mail copies of the Notice to any other potential members of the Class that request copies or that otherwise come to its attention.

10. As soon as publication schedules practically permit, but no sooner than five (5) days after the initial mailing of the Notice, the Settlement Administrator shall cause the Summary Notice, the content of which shall be substantially as set forth in Exhibit F to the Settlement Agreement, to be published in accordance with the Summary Notice program, a; set forth in the parties' Memoranda in Support of the Joint Motion for Preliminary Approval of Settlement, Certification of a Settlement Class, Approval of Notice and Entry of an Injunction Against Prosecution of Settled Claims.

11. The Court finds that the foregoing plan for notice to the Class will provide the best notice practicable under the circumstances, and is in compliance with the requirements of Rule 23 of the Federal Rules of Civil Procedure and applicable standards of due process.

12. Prior to the Settlement Hearing, (a) the Settling Defendants shall file with the Court an affidavit or declaration from a representative of Settling Defendants, or from an appropriate representative of the fine or firms engaged to assist in the process of identifying members of the Class, as described in paragraph 8 above, of the steps taken to identify members of the Class, and (b) Plaintiffs' Settlement Counsel shall file with the Court an affidavit from a representative of the Settlement Administrator confirming that the plan for disseminating the Notice and the Summary Notice has been

accomplished in accordance with the provisions of paragraphs 8, 9 and 10 above.

13. Members of the Class who wish to exclude themselves from the Class must request exclusion in accordance with the instructions set forth in the Notice. Members of the Class who do not submit timely and valid requests for exclusion will be bound by the terns of the Settlement, in the event it is approved by the Court and becomes effective, and any orders and judgments subsequently entered in the Action, whether favorable or unfavorable, regardless of whether they submit Claims for Landowner Benefits to the Settlement Administrator. Members of the Class who submit timely and valid requests for exclusion will not be bound by the terms of the Settlement or any orders or judgments subsequently entered in the Action, and they may not submit Claims for Landowner Benefits to the Settlement Administrator.

14. This Court finds that it has the authority, pursuant to Fed.R.Civ.P. 70 and as provided in the Settlement Agreement, to (a) direct all members of the Class who own a current interest in a Qualifying Parcel and have not requested exclusion from the Class, regardless of whether they file a Claim for Landowner Benefits, to grant an Easement and Right of Way Agreement to the Settling Defendants, as provided in tne Settlement Agreement, and (b) direct the Settlement Administrator to execute an Easement and Right of Way Agreement on behalf of all members of the Class who own a current interest in a Qualifying Parcel and who did not exclude themselves from the Class, but did not themselves execute an Easement and Right of Way Agreement. Members of the Class shall be advised in the Notice and Summary Notice of the Court's authority to convey an easement in their property, unless they exclude themselves from the Class. The Class Notice shall also advise Class Members that Plaintiffs will be entitled and required, in certain circumstances, to institute ancillary proceedings in other states, on behalf of the Class, for the purpose of obtaining judg-

ments quieting or otherwise confirming Settling Defendants' rights in the real property granted by the Easement and Right of Way Agreement.

15. Members of the Class who do not request exclusion may submit by a date to be established after Class members have been identified written comments on or objections to the Settlement, the application for an award of fees and expenses, or other Settlement-related matter. Any member of the Class who has not requested exclusion may also attend the Settlement Hearing, in person or through counsel, and if the Class Member has submitted written objections, may pursue those objections. However, no Class Member shall be entitled to contest the foregoing matter in writing and/or at the Hearing unless the Class Member has served and filed by first-class mail, postage prepaid and postmarked no later than forty-five (45) days before the date of the Settlement Hearing, copies of the statement of objection, together with any supporting brief and all other papers the Class Member wishes the Court to consider (which must include the name and number of this case: Smith v. Sprint, et al., Case No. 99 C 3844, and a notice of appearance from any counsel for the Class Member who intends to appear at the Hearing. Such notices and papers must be filed with the Court at the following address:

Office of the Clerk
United States District Court
Northern District of Illinois
Everett McKinley Dirksen Building
219 South Dearborn Street
Chicago, Illinois 60604;

and served on Plaintiffs' Settlement Counsel who shall provide the same to other counsel of record:

Samuel D. Heins
Heins Mills & Olson, P.L.C.
3550 IDS Center

80 South Eighth St.
Minneapolis, MN 55402:

and on the following representative of the Settling Defendants:

J. Emmett Logan
Stinson Morrison Hecker L.L.P.
2600 Grand Avenue
Kansas City, Missouri 64108

Each statement of objection must identify (1) the name and address of the Class Member, and (2) the name and address of the Class Member's counsel, if any, and, (3) in order to confirm Class membership, the legal description of the Class Member's Qualifying Parcel. Unless otherwise directed by the Court, any Class Member who does not submit a statement of objection in the manner specified above will be deemed to have waived any such objection.

16. All papers in support of the proposed Settlement and Plaintiffs' Class Counsels' application for an award of attorneys' fees and expenses shall be filed at least thirty (30) days prior to the Settlement Hearing.

17. During the Court's consideration of the Settlement and pending further order of the Court, all proceedings in this Action, other than proceedings necessary to carry out the terms and provisions of the Settlement Agreement, and to effectuate the procedures regarding the determination of attorneys fees, are hereby stayed and suspended.

18. If the proposed Settlement is not approved by the Court or for any reason does not become effective, the Settlement Agreement will be regarded as nullified, certification of the Class for settlement purposes will be vacated, and the steps and actions taken in connection with the proposed Settlement (including this Order (except as to this paragraph) and any judgment entered herein) shall become void and have no further force or effect. In such event, the parties and

their counsel shall take such steps as may be appropriate to restore the pre-settlement status of the litigation.

19. Neither the Settlement Agreement nor the provisions contained therein, nor any negotiations, statements, or proceedings in connection therewith shall be construed, or deemed to be evidence of, an admission or concession on the part of any of the Plaintiffs, the Settling Defendants, any member of the Class, or any other person of any liability or wrongdoing by all of them, or of any lack of merit in their claims or defenses, and shall not be offered or received in evidence in any action or proceeding.

20. The court retains jurisdiction of this action and of all matters relating to the Settlement.

Dated: July 25, 2003

The Honorable Wayne R. Andersen
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

WAYNE P. SMITH, on his behalf and all others similarly situated,	)
Plaintiffs,	) **Case No. 99 C 3844**
v.	)**Honorable Wayne Anderson**
	)**Magistrate Judge Geraldine Soat Brown**
SPRINT CORPORATION, et al.,	)
Defendants.	)

MEMORANDUM OPINION REGARDING INTERVENORS' MOTION FOR DISCOVERY OF SETTLEMENT NEGOTIATIONS.

Magistrate Judge Geraldine Soat Brown

The District Judge has referred discovery motions to this Court for ruling. [Dkt# 147.] Intervenors George and Ruth Schillinger by their counsel have filed a Motion for Discovery of Settlement Negotiations [dkt# 149] seeking discovery of the negotiations that led to the Settlement Agreement dated as of September 4, 2002 (the "Settlement Agreement") [dkt# 140] between a proposed class of plaintiffs on one hand and Sprint Corporation, Sprint Communications Company L.P., Qwest Communications Corporation and others (the "Settling Defendants") on the other hand. Intervenors seek discovery of the face to face negotiation meetings, drafts of the Settlement Agreement, and depositions of the

key settlement negotiators. (Mem. Supp. Mot. at 2.) The Settling Defendants and the counsel for the plaintiffs advocating approval of the Settlement Agreement (hereinafter referred to as the "Plaintiffs' Counsel") oppose such discovery. For the reasons set out herein, that motion has been granted in part and denied in part. [Dkt# 222.]

In reviewing the proposed settlement of a class action, the District Judge must determine whether the settlement is fair, adequate and reasonable, and not a product of collusion. *Reynolds v. Beneficial Nat'l. Bank,* 288 F.3d 277, 279 (7th Cir. 2002). The District Judge must keep in mind a number of considerations, including: protecting the class from lawyers for the class who may, in derogation of their duty to the class, place their pecuniary self-interest ahead of the interests of the class (288 F. 3d at 282); being alert to the possibility of a "reverse auction" in which the defendant in a series of class actions deliberately negotiates with the most ineffectual class lawyers (*Id.*); and avoiding turning the fairness hearing into a trial of the merits of the claims. (*Id.* at 285). The Intervenors argue that those considerations require discovery of the settlement negotiations leading to the Settlement Agreement.

In certain cases courts have permitted the parties objecting to a proposed settlement to take discovery of the circumstances leading up-to the agreement. For example, in *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106 (7th Cir. 1979), the Seventh Circuit reversed a decision to approve a class settlement where it appeared that the Illinois Attorney General had violated a court order by participating in settlement negotiations with the defendant without the consent of other plaintiffs' counsel. The court held that those facts justified discovery by the objectors to determine whether those negotiations might have prejudiced the class. *Id.* at 1126. However, discovery of settlement negotiations is the exception, not the norm.

> Discovery of settlement negotiations in ongoing litigation is unusual because it would give a party information about an opponent's strategy . . . . Such discovery is proper only where the party seeking it lays a foundation by adducing *from other sources* evidence indicating that the settlement tray be collusive, as in the *General Motors* case where negotiations with one class counsel were carried out in violation of the district court's order.

Mars Steel Corp. v. Continental Illinois Nat'l. Bank, 834 F.2d 677, 684 (7th Cit. 1987)(emphasis added). In Mars, the Seventh Circuit affirmed the district court's approval of the settlement, concluding that the District Judge did not abuse his discretion in refusing to permit the objectors to take discovery about the settlement negotiations. *Id.* The Seventh Circuit observed that there was no indication of "hanky-panky" in the settlement in *Mars,* which was highly favorable to tire class. *Id.*

The policy reasons for requiring a threshold showing before compelling discovery of settlement negotiations are apparent. In general, the law favors settlement, and recognizes in Federal Rule of Evidence 408 that the confidentiality of settlement negotiations furthers this goal, while also recognizing that there are exceptions to that confidentiality. Likewise, if discovery including the depositions of the negotiators were routinely ordered when an objection is made to a class action settlement, the potential to chill settlement negotiations is obvious. The risk to a party of exposing strata or weakness or revealing attorney-client privileged communications would be multiplied. See discussion of this point in *Mars,* 834 F.2d at 684. In addition, the costs and time of litigation, which the parties hope to bring to an end by settlement, would be increased by the discovery process and additional depositions.

The Seventh Circuit observed in Mars, that the court does not "prescribe the modalities of negotiation" and "[t]he proof of the pudding [is] indeed in the eating." *Id.* at 684. The District Judge's objective is to determine if a proposed settlement agreement is fair to the class. Discovery of settlement negotiations is only worth the effort and the risk if it contributes in a meaningful way to that determination. On the other hand, the *Engine Interchange* case instructs that District Judge cannot trust that the fairness hearing alone will safeguard the interests of the class where there is evidence of improper conduct potentially harmful to the interest of the class. Ultimately, the decision about such discovery is left to the discretion of the District Judge.

In this case, a substantial part of the Intervenors' argument for discovery is that the proposed settlement is the product of collusion because it provides inadequate compensation to the class members and is unfair and burdensome to the class. (Mem. Supp. Mot. at 9-15.) The Plaintiffs' Counsel and the Settling Defendants argue otherwise, and state that the settlements to which the Intervenors compare the Settlement Agreement have significantly different facts. (Mem. Opp'n. Mot. at 16-27; Defs.' Mem. Opp'n. Mot. at 11-15.) However, a disagreement about the merits of the Settlement Agreement cannot be the basis for a ruling permitting discovery of settlement, negotiations, or discovery would be available in virtually every proposed class settlement to which there is an objection. Obviously, most objections are based on an argument that the proposed settlement is inadequate or unfair to the class. Accordingly, the Seventh Circuit requires evidence "from other sources" that the settlement may be collusive. *Mars*, 834 F.2d at 684.

Unlike the Mars case, there is no allegation here that the settlement negotiations were conducted in violation of a court order. However, the Intervenors identify other grounds that they assert give rise to a suspicion of collusion or reverse auction, and thus justify discovery.

They argue that the Settling Defendants engaged in lawyer shopping, singling out ineffectual Plaintiffs' counsel to negotiate with. (Mem. Supp. Mot. at 6.) Not surprisingly, the Plaintiffs' Counsel vigorously dispute the suggestion that they are ineffectual, and state that at the time settlement negotiations began in the fall of 2000, the law firms that collectively comprise Plaintiffs' Counsel had filed 15 lawsuits on the issue of fiber optic cable right of way against the Settling Defendants and MCI.[1] They also state that they pursued those cases aggressively, taking voluminous discovery and briefing contested motions, before the settlement talks began. The Plaintiffs' Counsel state that they collectively have invested millions of dollars in expenses and *thousands of* hours of legal work in litigating the cases. (Men. Opp'n. Mot. at 12-14.)

While the lawyers dispute which group is the more effective advocate, it is clear that the situation here is not remotely like that of the *Reynolds* case, where a defendant chose to conduct settlement negotiations with two lawyers who at the time negotiations began did not even have a single pending lawsuit against either of the defendants. 288 F.3d at 280. In this case, while the Intervenors' counsel argue that they are a greater threat to the Settling Defendants, it is apparent that the Plaintiffs' Counsel have also been engaged in genuine litigation efforts against the Settling Defendants. There does not appear to this Court to be any basis for concluding that the Settling Defendants chose to negotiate with the Plaintiffs' Counsel because the Settling Defendants believed that the Plaintiffs' Counsel could not or would not effectively represent the class.

The intervenors also argue that the exclusion of their counsel from the settlement negotiations is evidence of col-

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[1] MCI WorldCom was originally part of the settlement negotiations but is not part of the Settlement Agreement due to its filing for bankruptcy protection.

lusion. The Intervenors state that, in March 2001, during discussions regarding discovery issues in one of the cases filed by Intervenors' counsel, one of Qwest's attorneys, John Daum, remarked that he would rather discuss settlement with a "greedy plaintiffs' lawyer" than an ideologue like Nels Ackerson, one of Intervenors' counsel. (Mem. Supp. Mot. at 8.) Mr. Daum responds with an affidavit in which he states that in March, 2001, Qwest was involved in settlement negotiations with the lawyers from the law firm Heins, Mills & Olson (now part of the Plaintiffs' Counsel), who had five lawsuits then pending against Qwest. (Daum Dec. ¶ 2, attached to Defs.' Mem. Opp'n. Mot.) Mr. Daum states that he discussed possible settlement with John Massopust (now one of Intervenors' counsel) who was representing the plaintiffs in a fiber optic cable lawsuit against Qwest in Texas. (*Id.*) As of that time, Mr. Daum had never met or spoken with Mr. Ackerson, but had heard from counsel for AT&T, which conducted extensive negotiations with Mr. Ackerson, that Mr. Ackerson was unreasonable, arrogant, full of himself, untrustworthy and difficult to deal with. (*Id.* ¶ 4.) Mr. Daum states that he made the "greedy plaintiffs' lawyer" remark in a jocular sense, because Mr. Massopust was attempting to persuade him (Mr. Daum) that Mr. Massopust was a reasonable person to negotiate with. (*Id.* ¶ 5.) Thereafter, Qwest had "two and possibly three meetings" with Mr. Massopust to discuss settlement, which were not successful, but were cordial and businesslike. (*Id.* 1 6.)

Plaintiffs' Counsel submit the affidavit of Samuel Heins, a shareholder of the law firm Heins, Mills & Olson, and one of the present Plaintiffs' Counsel. (Attachment to Mem. Opp'n. Mot.) Mr. Heins states that in the fall of 2000, the present Plaintiffs' Counsel were approached by the Settling Defendants' counsel (and MCI's counsel) to discuss settlement. (*Id.* ¶ 2.) He demanded and received an agreement from Settling Defendants' counsel that the negotiations would not be a negative auction, that Settling Defendants

would not negotiate with any other group of plaintiffs' counsel while the negotiations were ongoing, and that Plaintiffs' Counsel would not be asked by Settling Defendants to negotiate with reference to any position taken by any other plaintiffs' counsel. (*Id.* ¶ 5.) He further states that Settling Defendants abided by that agreement, and never attempted to drive down the class settlement by holding out the possibility of negotiating with other plaintiffs' counsel. (*Id.* ¶¶ 6, 10.) Mr. Heins is aware that Qwest met one time with attorneys from the Ackerson Group after that law firm made a motion to be included in settlement negotiations in *Hudson v. Qwest,* where the Ackerson Group represents certain intervenors, but was informed that no specific compensation was discussed. (*Id.* ¶ 7.)

In reply, the Intervenors attach the Affidavit of Mr. Massopust. (App. Ex. Intervenors' Consol. Reply, Ex. 1.) Mr. Massopust states that in early 2001, he called Mr. Daum to discuss settlement, but got no response. (*Id.* ¶ 2.) Mr. Massopust states that Mr. Daum made his "greedy plaintiffs' lawyer" comment to Dan Millea, Mr. Massopust's partner during a meet-and-confer discussion about discovery issues in litigation against Qwest. (*Id.* ¶ 3.) Mr. Massopust again contacted Mr. Daum in May or June 2001 and suggested discussing settlement. He and his co-counsel Henry Price met with Mr. Daum on July 3, 2001, and provided a two-page document of guiding principles for a settlement with Qwest. (*Id.* ¶ 4.) Mr. Massopust states that Mr. Daum reviewed the document and indicated that he found it generally acceptable. (*Id.* ¶ 5.) Mr. Massopust was aware that Mr. Daum was also negotiating with Samuel Heins of the Heins, Mills & Olson firm, but was not informed that there was an agreement that those talks would be exclusive. (*Id.* ¶ 6.) Mr. Massopust states that he met again with Mr. Daum on August 16, 2001, and Qwest made a specific settlement offer, which Mr. Massopust memorialized in a letter along with his counterdemand to the offer. (*Id.* 1 ¶ 7.) That letter is attached as Ex-

hibit B to his affidavit. He states that he never received a response from Qwest and about a month later learned that Qwest and the other Settling Defendants had reached agreement with the Plaintiffs' Counsel at $.60 per square foot. (*Id.*)

Mr. Massopust states that he also approached defendant Sprint about settlement, writing to Sprint's counsel on May 17, 2001. (*Id.* ¶ 10.) He received a short response stating that "Sprint is interested in exploring any reasonable method for resolving this litigation" and asking for "specific information" about how Mr. Massopust believes settlement could be achieved. (*Id.*, Ex. D.) On June 25, 2001, Mr. Massopust wrote to Sprint's counsel outlining a settlement proposal. (*Id.* ¶ 11.) Mr. Logan responded on July 16, 2001, saying that it was not interested in certain aspects of Mr. Massopust's proposal, including the creation of a "Class Corridor LLC" and saw no reason to believe that a meeting would be fruitful. (*Id.*, Ex. F.) Mr. Massopust wrote back to Sprint's counsel on July 27, 2001, but never received a response. (*Id.* ¶ 11.)

Intervenors Hallaba and Chem-Tronics argue that there is a *possibility* that their settlement negotiations with WorldCom in November 2000, which were then confidential, were leaked to the Plaintiffs' Counsel, which would then be in a position to undercut Hallaba. (M.A.S. Hallaba and Chem-Tronic, Inc.'s Reply Supp. Mot. at 2.) According to Mr. Heins, Hallaba's counsel as well as the judge presiding in that case, were told by letter in December 2000 that MCI was discussing settlement with "other plaintiffs' counsel." (Hems' Dec. 5.) Hallaba contends that in December 2000, a settlement was reached with MCI Worldcom. (M.A.S. Hallaba and Chem-Tronic, Inc.'s Reply Supp. Mot. at 2.) Hallaba's motion to enforce that alleged settlement was denied on September 5, 2001. *Hallaba v. WorldCom Network Ser-*

vices. Inc. 98-cv-895 (N. D. Okla.).[2] The timing of the possible leak is so remote from the conclusion of the settlement negotiations leading up to the Settlement Agreement at issue here that this suspicion cannot constitute the evidence necessary to justify undertaking discovery.

Intervenors argue that the submission of affidavits by Messrs. Heins and Daum requires that the Court permit depositions of the affiants. However, that argument goes too far, because it would then surrender the Court's control over the conduct of discovery to the parties. Especially in an area where, as discussed above, discovery is not the norm but the exception, the Court must determine what discovery, if any is appropriate.[3] *Computer Network Corp. v. Spohler,* 95 F.R.D. 500 (D.C. D.C. 1982), cited by Hallaba (M.A.S. Hallaba and Chem-Tronic, Inc.'s Reply Supp. Mot. at 3-4), is not to the contrary. In that case a lawyer had submitted an affidavit on the merits of the litigation in connection with a motion for expedited discovery. Apparently there was no dispute that the lawyer's deposition should proceed; the issue was whether the factual basis for the statements made in the affidavit could be shielded by attorney-client privilege, and the court concluded that they could not. *Computer Network Corp.,* 95 F.R.D. at 502-03.

Having reviewed carefully the affidavits and exhibits; this Court concludes that they do not support an inference of collusion. The Intervenors were not precluded from making a proposal to the Settling Defendants. They made proposals to two defendants, but neither was interested in the settlement the Intervenors proposed. Likewise, there is no evi-

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[2] An appeal of that decision is pending in the Tenth Circuit Court of Appeals, but stayed because of the MCI WorldCom bankruptcy filing.

[3] In contrast, the case cited by Hallaba, *Russell v. Acme-Evans Co.,* 51 F.3d 64, 70 (7th Cir. 1995), involves an affidavit submitted by the defendant in support of a motion for summary judgment. The deposition of such fact witnesses is, of course, customary.

dence that the Settling Defendants solicited demands from different plaintiffs' groups in an effort to play them off against each other. On the contrary, the Intervenors' counsel was the one who approached the Settling Defendants and made specific proposals that were rejected.

Based on the foregoing, the only possible question is whether the two settlement proposals made by the Intervenors' counsel in the spring and summer of 2001 had a negative impact on the settlement then being negotiated by Plaintiffs' Counsel, that is, whether the Settling Defendants used the proposals to extract better terms from the Plaintiffs' Counsel. If there were a "reverse auction" in which the Settling Defendants played the Intervenors' counsel's proposals against the proposals advanced by the Plaintiffs' counsel, it would presumably be reflected in a change (to the detriment of the class) in the settlement proposals being negotiated with Plaintiffs' counsel, coinciding with the overtures made by the Intervenors' group. The evidence of reverse auction should manifest itself in the paper trail of the negotiations.

In this case we have the services of James D. Wilson, the special master appointed by the District Judge pursuant to the agreement of the parties, whose scope includes assisting in the assessing the fairness of the Settlement Agreement. (Order Appointing James D. Wilson.) [Dkt# 180.] Producing the documents reflecting the course of the settlement negotiations to Mr. Wilson serves the purpose of detecting whether there is evidence of a reverse auction while avoiding the disruption and risks inherent in producing settlement drafts to other parties that are opposing the settlement, and who would, if the settlement was not approved, be continuing in litigation against the Settling Defendants.

For the foregoing reasons, this Court orders as follows:

1. On or before November 26, 2002, "Plaintiffs' Class Counsel" and "Settling Defendants," as those terms are defined in the Settlement Agreement dated as of September 4,

2002, shall deliver to special master James D. Wilson one copy of:

(a) all written settlement proposals;

(b) all drafts of the Settlement Agreement, including exhibits thereto; and

(c) all cover letters to those documents;

that were exchanged between the Plaintiffs' Class Counsel or anyone on their behalf on the one hand, and the Settling Defendants or anyone on their behalf on the other hand, between April 1, 2001 and September 4, 2001. (These documents are hereinafter referred to as the "Settlement Draft Documents.") The producing party may redact from the copy any notes that were not included on the Settlement Draft Documents as transmitted to the opposing side. This is not a waiver by any party of any objection to the admissibility of any document or evidence pursuant to Federal Rule of Evidence 408.

2. Mr. Wilson shall maintain the Settlement Draft Documents in confidence and access to them shall be limited to the Wilson Group as provided in the Order Appointing James D. Wilson. Mr. Wilson shall review the Settlement Draft Documents to determine whether they evidence a "reverse auction" as that term is used in *Reynolds v. Beneficial Nat'l. Bank*, 288 Fad 277, 282 (7th Cir. 2002). He shall report to the Court concerning his findings in this respect.

3. In all other respects, Intervenors' Motion is denied.

IT IS SO ORDERED.

GERALDINE SOAT BROWN
UNITED STATES MAGISTRATE JUDGE

NOVEMBER 19, 2000

United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois 60804

December 13, 2004

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

Nos. 03-3087, 03-3140, 03-3659 & 03-3660

WAYNE SMITH, LESCO ENTERPRISES, INC., SAN SIMON GIN, INC., GROSS-WILKINSON RANCH CO., REX DOLAN, EVERETT CHAMBERS, and JOANNE CHAMBERS, on their behalf and all others similarly situation,

Plaintiffs-Appellees,

v.

SPRINT COMMUNICATIONS COMPANY, L.P., QWEST COMMUNICATIONS

Appeals from the United States District Court for the Northern District of Illinois Eastern Division.

No. 99 C 3844

Wayne R. Anderson, *Judge*

CORPORATION, LEVEL 3
COMMUNICATIONS, LLC,
WILTEL COMMUNICATIONS,
LLC, and UNION PACIFIC |
RAILROAD COMPANY,
Defendants-Appellees.

APPEALS OF:
CHEM-TRONICS, TNC.
DANIEL R. BUHL,
JOE C. MEIGHAN, JR.,
CHARLES W. HORD, and
JOY PRATT HORD,
Intervenors.

ORDER

Petitions for rehearing and rehearing en banc were filed in this ease on November 2, 2000. The panel vote l 2-1 (Judge Cudahy dissenting) to deny rehearing. The petitions for rehearing are, accordingly, DENIED. No judge has requested a vote on the petitions for rehearing en banc.[1] Accordingly, they are DENIED.

SO ORDERED

[1] Chief Circuit Judge Flaum and Circuit Judge Rovner did not participate in the consideration of this case.

Appendix D

FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact com-

mon to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

• the nature of the action,

• the definition of the class certified,

• the class claims, issues, or defenses,

• that a class member may enter an appearance through counsel if the member so desires,

• that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and

• the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be

given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request ex-

clusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

• the work counsel has done in identifying or investigating potential claims in the action,

• counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

• counsel's knowledge of the applicable law, and

• the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a

reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

Appendix E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

VINCENT E. BUCHENAU, *et al,*	
Plaintiffs	Case No. 99 CV 3844
v.	Honorable Wayne R. Andersen
SPRINT CORPORATION, *et al.,*	Magistrate Judge Brown
Defendants	

REPORT OF SPECIAL MASTER

Now comes James D. Wilson, acting as Special Master, pursuant to order of Appointment entered by this Court on October 16, 2002 and the Court's direction in its Orders of November 19, 2002 [dkt# 228] and November 21, 2002 [dkt# 242], and reports as follows:

On or about November 19, 2002, in response to Intervenors George and Ruth Schillinger's Motion for Discovery of Settlement Negotiations, the Court ordered the *in camera* production of "(a) all written settlement proposals; (b) all drafts of the Settlement Agreement, including exhibits thereto; and (3) all cover letters to those documents." [dkt# 228] As amended, the Order required the production of all documents exchanged by "Plaintiffs Class Counsel" and the "Settling Defendants" between April 1, 2001 and October 8, 2001. [dkt# 228, 242] The Court further ordered that the Special Master review such materials and report his findings

as to whether the documents inspected provided evidence of a reverse suction as that term is used in *Reynolds v. Beneficial National Bank,* 288 F.3d 277 (7th Cir. 2002).

Pursuant to the Court's Order of November 19, 2002, on November 26, 2002, the following documents were produced for inspection:

DATE	FORMAT	SENDER	RECIPIENT	ATTACHMENT
04/18/01	E-mail	Daum	Heins	Heads of Agreement
06/12/01	Letter	Logan	Heins and Defense Counsel	Settlement Agreement
07/02/01	E-mail	Logan	Heins and Defense Counsel	Easement Exhibit
07/03/01	E-mail	Logan	Heins and Defense Counsel	Settlement Agreement
07/12/01	E-mail	Logan	Steiner and Defense Counsel	Settlement Agreement
07/27/01	E-mail	Steiner	Defense Counsel	Settlement
				Agreement and Exhibits
08/27/01	Fax	Heins	Defense Counsel	Letter about Expenses
08/30/01	E-mail	Logan	Steiner and Defense Counsel	Settlement Agreement
08/30/01	E-mail	Steiner	Loan	None
09/05/01	E-mail	Steiner	Loan	None
09/06/01	Fax	Steiner	Defense Counsel	Settlement Timeline
09/07/01	E-mail	Steiner	Loan	Exhibits
09/12/01	E-mail	Steiner	Logan and Defense Counsel	Settlement Agreement
09/14/01	E-mail	Steiner	Logan and	Preliminary

			Defense Counsel	Approval Order
09/25/01	E-mail	Jones	Steiner and Defense Counsel	Settlement Agreement
09/27/01	E-mail	Steiner	Jones	Final Order
10/01/01	Letter	Heins	Daum	Ancillary Proceedings Language
10/02/01	E-mail	Jones	Steiner and Defense Counsel	Settlement Agreement
10/02/01	E-mail	Steiner	Logan	Ancillary Proceedings Language
10/03/O1	E-mail	Steiner	Defense Counsel	None
10/05/01	E-mail	Zaccardi	Defense Counsel	Provision on Ancillary Judgments
10/05/01	E-mail	Steiner	Defense Counsel	Class Notice
10/05/01	E-mail	Jones	Steiner and Defense Counsel	Settlement Agreement

I have reviewed each of the listed documents and the accompanying attachments and find that for the reasons stated below they do not provide evidence that a reverse auction was conducted in this matter.

REVERSE AUCTION

An auction is defined as "a public sale of property to the highest bidder by one licensed and authorized to do so and the goal of which is to obtain the best financial return for the seller by free and fair competition among bidders. 7 Am. Jur. 2d, *Auctions and Auctioneers,* § 1 (2002). Competitive bidding is an essential element of an auction sale. *Id.* The United States Court of Appeals for the Seventh Circuit has defined a reverse auction as the practice whereby the defen-

dant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant. *Reynolds v. Beneficial National Bank,* 288 F.3d 277, 282 (7th Cir. 2002).

Here, the objectors argue that the proposed settlement was the result of a reverse auction. If true, one would expect to see evidence that the defendants attempted to buy the best release for the lowest price by establishing competition among bidding plaintiffs' counsel. Ultimately, this would lead to a settlement with the weakest lawyer at the lowest price. Evidence of a reverse auction might include negotiations which result in the cost of settlement to the defendants decreasing in actual monetary terms, or the other terms becoming more favorable to the defendants as the settlement is shopped amongst competing plaintiffs' counsel. Similarly, because the "reverse auction" the Seventh Circuit described in the *Beneficial National Bank* case is not conducted as a traditional suction with a series of closely spaced sequential bids, one might expect to observe some delay between bids and offers while the settlement is shopped to other counsel. Finally, one might expect to see reference to the competing bidder or bidders in the communications as the defendants attempt to maximize their leverage as the "auctioneer."

Here the documents provided present no evidence of a reverse auction. The documents reveal that the per foot price went up during the relevant time period, increasing total settlement costs to the defendants. Although not all, many of the settlement terms improved for the proposed plaintiff class *vis a vis* both the defendants and the plaintiffs' counsel as the drafts progressed. There is no indication in the documents submitted that a third party bidder was involved, much less being used to reduce the consideration. Other than the two month delay between the "Heads of Agreement" and the first draft Settlement Agreement, there appears to be no significant delay in the negotiations which would have allowed

the settlement to be shopped or bid upon by other potential counsel.

The documents evidence significant disagreement, re-writing and compromise in the language of the Settlement Agreement. There appear to have been disputes over changes in language which are typical when there is vigorous advocacy by both defendants' counsel and proposed plaintiffs' class counsel. Nothing within the documents provided is "evidence" of a reverse auction.

For the foregoing reasons, I find that there is no evidence in the documents submitted pursuant to the Court's November 19, 2002 Order of a reverse auction being conducted in this matter.

_____
James D. Wilson
Special Master

James D. Wilson
SHEFSKY & FROELICH LTD.
25th Floor
444 N. Michigan
Chicago, IL 60611
(312) 527-4000
No. 29143

CERTIFICATE OF SERVICE

The undersigned, pursuant to the penalties for perjury, states and affirms that she forwarded a true and correct copy of the foregoing *Report of Special Master* via e-mail to the names listed on the Service List this 3rd day of January, 2003

_____

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Supreme Court, U.S.
FILED
MAY 13 2005
OFFICE OF THE CLERK

No. 04-1381

IN THE

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P., *et al.*,

Petitioners,

v.

WAYNE SMITH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CHEM-TRONICS, INC.

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Attorneys for Respondent Chem-Tronics, Inc.

194412

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

LIST OF PARTIES

The Petition does not completely list the parties. It excludes Union Pacific Railroad, which was a defendant in the trial court, an appellee in the Seventh Circuit and is a Respondent pursuant to Supreme Court Rule 12.6. Union Pacific Railroad waived its right to file a brief in the Seventh Circuit and has not filed a pleading in the Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Respondent Chem-Tronics, Inc. has no parent corporation and that no publicly held company owns 10% or more of its stock.

COUNTERSTATEMENT OF THE CASE

Contrary to the Petitioners' arguments, the Seventh Circuit's decision does not create new law on any issue and certainly does not hold or even suggest either that as a matter of law a settlement class cannot be certified when a litigation class cannot be certified, or that one litigant cannot be an adequate representative for a previously certified litigation class. All that the Seventh Circuit held in this appeal from the preliminary approval of a proposed class settlement was that a putative settlement class representative has a burden of demonstrating that he was an adequate representative before he procured a class settlement. Given its intimate exposure to the deep history of this and related litigation, the Seventh Circuit's narrow holding in the face of boilerplate trial court findings is virtually routine.[1]

This is one of only a relative handful of state and federal class actions arising from the installation of fiber optic cable on railroad rights-of-way without ascertaining land title and obtaining permission from the fee owners of the land. *See*, Petition at 4; Appendix to Petition (hereinafter "App.") at 2a. In an effort to imbue this case with an aura of national import, Petitioners hyperbolically suggest — without any record support — that these actions seek to have the fibers "stripped out of their physical beds." But that is arrant nonsense. The actions are merely trespass claims seeking the standard damages and other similar relief afforded by state law.

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[1] The holding is: "We agree with the intervenors that they are inadequately represented by the settling plaintiffs. We therefore VACATE the nationwide class certification and the district court's injunction against competing class actions and REMAND the case to the district court for further proceedings." App. 5a.

The trial court's stock finding was: "The Plaintiffs, represented by counsel experienced in complex litigation, will fairly and adequately protect the interests of the class." App. 13a.

Previous attempts to certify a monolithic class in related cases were successfully *opposed* by Petitioner Sprint Communications Company, L.P., ("Sprint") including a prior case in the Seventh Circuit where that court agreed with Sprint that the trial court failed to make necessary findings of the class representative's adequacy under Rule 23(a) and (b)(3). *See, Isaacs v. Sprint Corp.*, 261 F.3d 679, 682 (7th Cir. 2001).

For their part, none of the putative settlement class representatives below or their counsel even did enough work in any of their scattered cases to approach class certification status. The record below was that the settling plaintiffs had abandoned the prosecution of most of their cases at an early date (*See*, R.346, Exhibit D) and they were rejected as class representatives on the rare instances when the issue was broached. *See, e.g., Chambers v. Sprint Corporation,* 2002 U.S. Dist. LEXIS 22621 (W.D. Wis. March 2, 2002). "Disarmed" in relation to negotiating a class settlement scarcely begins to describe them.

By comparison, as the Seventh Circuit noted, Chem-Tronics and others had successfully obtained appropriate class certification and were marching determinedly forward, being on the "eve of trial" in Kansas and Tennessee, respectively. *See*, App. 4a. As a result, the settlement class representatives faced being made irrelevant in the litigation, which drove them to pull up stakes in the Northern District of Illinois when the trial court proved chary to their settlement overtures (and where Seventh Circuit review was inevitable) and gallop for judicial approval of their proposed national class settlement to an unwitting District Court in Oregon. The Oregon court was not gulled, however, and dismissed the proposed amended complaint in that action as a sanction for "judge shopping" and recommended that the parties return to their fate in Illinois. *Zografos v. Qwest Communications Corp.*, 225 F.Supp.2d 1217, 1223 (D.Or. 2002). Just as any court would, the Seventh Circuit found this skulking behavior on the part of settlement class representatives to be deeply troubling. *See*, App. 3a.

To make matters worse, during all of the foregoing scramble for approval of a flawed settlement, the parties in the trial court excluded the appealing Respondents, the other intervenors, and all other plaintiffs' counsel from all settlement discussions. The result was predictable: a sweetheart monolithic class settlement that ignored intra-class legal and factual differences perceived by the Seventh Circuit in *Isaacs*.

Given a close look at all of this byzantine maneuvering, it was inevitable that the Seventh Circuit would conclude that the adequacy of representation problems that it had perceived earlier in *Isaacs* still had not been met *and* that the sweetheart settlers were "disarmed" in every sense and could not represent the interests of parties (that is, Chem-Tronics and others) that did wield an actual threat of litigation. *See*, App. 4a. Given the failures and carnival-like performances of the settlement class representatives here, the reversal and decertification were almost certain.

On request for *en banc* review, no member of the Seventh Circuit, including the dissenter, Judge Cudahy, voted for reconsideration of the majority result.

REASONS FOR DENYING THE PETITION

Neither of the two questions proposed by the Petitioners warrants review of this case. Each is premised on factually incorrect statements by the Petitioners of the Seventh Circuit's holding. The result here was fact-driven based upon a record of actual inadequacy, not based on doctrinal deficiency.

All the Seventh Circuit did was rule (consistent with Petitioner Sprint's successful earlier assertions to that court in *Isaacs*) that class member legal and factual differences in national trespass damage cases raised serious adequacy issues that needed to be resolved before any national settlement class could be certified. As Rule 10 of this Court admonishes, fact-

intensive discretionary rulings are not appropriate for review by writ of certiorari.

The fact-intensive nature of the Seventh Circuit's holding is manifest. Petitioners selected disarmed and truly hapless negotiating partners instead of Chem-Tronics and the other successfully litigating intervenors, which invariably weakened the result. Adequate representation of absent class members is the *sine qua non* of due process. *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). Adequacy to represent the class is first and foremost measured by whether counsel and client can be counted upon to honestly fulfill fiduciary obligations to the class. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *Mirfasihi v. Fleet Mort. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). Inept and unsuccessful efforts to conduct class proceedings in a case will make a representative inadequate. *See, e.g., Greisz v. Household Bank*, 176 F. 3d 1012, 1013 (7th Cir. 1999); *Hatch v. Reliance Ins. Co.*, 758 F. 2d 409, 416 (9th Cir. 1985).

Chem-Tronics and the other appealing intervenors presented many examples to the Seventh Circuit of how the putative representatives procured a settlement that failed to protect the best interests of the members of the class. The Seventh Circuit needed to go no further than the prime issue of representation to see the need for reversal, but had it gone further and reviewed all the settlement terms, the result would have been just the same: reversal.

Predictably, the Petitioners cloak themselves with the presumed virtues of "any settlement in a litigation storm" by arguing general principles of fairness. But this Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), refused to permit the fairness inquiry under Rule 23(e) to "eclipse" Rule 23(a) and (b) and thereby permit both class counsel and this Court to

be disarmed. *Id.*, at 621. To adopt Petitioner's approach would just encourage more scoundrelly behavior by settlement class representatives of the sort seen by the Seventh Circuit here.

The Seventh Circuit's narrow holding was factually based and wholly consistent with this Court's admonitions that Class member protections should not be subverted to "chancellor's foot" appraisals of fairness. *Amchem*, 521 U.S. at 621. The settlement class representatives here were plainly inadequate by any measure recognized by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 04-1381

IN THE

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P., *et al.*,

Petitioners,

v.

WAYNE SMITH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF "SMITH RESPONDENTS" IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in holding – contrary to decisions of this Court and the Third and Tenth Circuits – that a settlement class cannot be certified as a matter of law when the class purportedly could not be certified for litigation.

2. Whether the Seventh Circuit erred in holding – contrary to decisions of the Third and Tenth Circuits – that a settlement class representative cannot satisfy the "adequacy" requirement of Rule 23(a) as a matter of law when the class includes members of already-certified litigation classes.

PARTIES TO THE PROCEEDING

Petitioners are Sprint Communications Company, L.P., Qwest Communications Corporation, Level 3 Communications L.L.C., and WilTel Communications, L.L.C. Petitioners were defendants in the district court and appellees in the court of appeals.

Respondents are Chem-Tronics, Inc., Daniel R. Buhl, Joe C. Meighan, Charles W. Hord, and Joy Pratt Hord. Respondents were intervenors in the district court and appellants in the court of appeals.

Respondents "by rule" under Rule 12.6 of the Rules of this Court are Wayne Smith, Swan Ranch LLC, Lesco Enterprises, Inc., San Simon Gin, Inc., Gross-Wilkinson Ranch Company, Rex Dolan, and Everett and Joanne Chambers, and all others similarly situated (collectively "Smith Respondents"), all of whom were plaintiffs in the district court and appellees in the court of appeals.

Additional intervenors in the district court did not appeal.

RULE 29.6 DISCLOSURE

None of the corporate Respondents has a parent company and no publicly held company owns 10% or more of the stock of any such Respondent.

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Pursuant to Rule 12.6 of the Rules of this Court, Respondents "By Rule" Wayne Smith, Swan Ranch LLC, Lesco Enterprises, Inc., San Simon Gin, Inc., Gross-Wilkinson Ranch Company, Rex Dolan, and Everett and Joanne Chambers ("Smith Respondents"), submit this Brief in support of the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

STATEMENT OF THE CASE

The Smith Respondents adopt and incorporate by reference the Statement of the Case submitted by Petitioners in their Petition for a Writ of Certiorari.

ARGUMENT

The decision of the Seventh Circuit in this case undermines the ability of parties to resolve overlapping and highly-contested nationwide class litigation by agreement. The decision below reversed the certification of a class for purposes of settlement on two flawed grounds: (i) that the perceived inability of the district court to certify a nationwide class for litigation purposes rendered settling plaintiffs and their counsel "disarmed" and therefore inadequate under Rule 23, precluding certification of a nationwide class pursuant to the settlement agreement; and (ii) that the existence of classes certified for litigation in other jurisdictions, which included members of the settlement class, rendered the settling plaintiffs inadequate as a matter of law under Rule 23 to represent the settlement class. In these respects, the decision below conflicts with the signal precedent of this Court, *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997), and relevant decisions of the Third and Tenth Circuits.

The decision's misapplication of this Court's precedent, and the conflict with other Circuits that is created by the decision, are likely to result in more numerous and further protracted proceedings in circumstances where an equitable and procedurally fair nationwide resolution would otherwise be available. Litigants facing the common scenario of multiple, related class actions will be less inclined to cooperate in a nationwide compromise of such litigation because of this case. Because the Seventh Circuit's decision will interfere with the important role of Rule 23 in resolving numerous parallel class actions by agreement and is directly contrary to established Rule 23 jurisprudence and the sound judicial policy favoring settlement, certiorari should be granted and the judgment of the court of appeals should be reversed.

A. The Decision Below That A Settlement Class May Only Be Certified Where A Litigation Class May Also Be Certified Conflicts With Decisions Of This Court And Other Circuits.

The Seventh Circuit majority relied upon this Court's opinion in *Amchem* when it found that the settling plaintiffs, the Smith Respondents, were "disarmed" when they negotiated the settlement agreement. According to the majority, the criticism of national classes contained in *dicta* in *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001), rendered the settling plaintiffs unable to "use the threat of litigation to press for a better offer" and therefore not in "a good position from which to represent the interests of parties that do wield such a threat." Pet. App. 4a. The implication of this analysis is that, if a class may raise manageability or other issues as to whether it is appropriate for certification for purposes of litigation, no plaintiff will

be adequate to represent a class certified for settlement. The majority's reliance on *Amchem* to support this conclusion directly conflicts with the holding of this Court.

In *Amchem*, this Court was faced in part with the question of whether a settlement class must meet all the requirements of Rule 23(a) and (b). This Court confirmed that settlement classes must satisfy Rule 23(a) and (b), but also held that "settlement is relevant to class certification" and a district court considering certification of a settlement class should acknowledge that "settlement is a factor in the calculus" by which this determination should be made. *Amchem*, 521 U.S. at 619-22. Specifically, this Court held that settlement obviates any inquiry into "whether the case, if tried, would present intractable management problems." *Id.* at 620. Thus, *Amchem* itself refutes any suggestion that the suitability of a proposed class for litigation is controlling in the analysis of whether the class should be certified for settlement.

This Court also did not find the propriety of a litigation class pertinent to whether class counsel were "disarmed" when negotiating a national settlement. Instead, the *Amchem* decision concerned a class of "exposure-only" members with no existing claims – a settlement class for whom *no other litigation* was possible:

> [I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation *despite the impossibility of litigation*, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval *without benefit of adversarial investigation.*

Id. at 621 (emphasis added; citations omitted). As noted by Judge Cudahy in his dissent, the settlement in the present case followed 12 years of litigation in numerous venues, and class counsel "could exert enormous leverage over the defendants" because the alternative was further protracted and disparate litigation. Pet. App. 7a. The Seventh Circuit's conclusion that class counsel were "disarmed" by the perceived unavailability of a national litigation class therefore misconstrues this Court's analysis in *Amchem*, and is in direct conflict with *Amchem*'s requirement that the settlement itself be considered when determining the propriety of certification of a settlement class.

The Petitioners correctly argue that the Seventh Circuit decision is also in conflict with opinions from other Circuits. In the cases of *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004), and *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180 (10th Cir. 2002), the Third and Tenth Circuits properly applied *Amchem* and found that certification of a settlement class was appropriate following a denial of certification for litigation. In light of the conflict between the Seventh Circuit's decision and the opinions in *Amchem*, *Warfarin* and *Rutter & Wilbanks*, this Court should grant certiorari and reverse the decision below.

B. The Decision Below That A Settling Plaintiff Is Inadequate To Represent A Settlement Class That Includes Members Of Pending Statewide Litigation Classes Conflicts With Decisions Of This Court And Other Circuits.

According to the Seventh Circuit panel's majority opinion, the settling plaintiffs were also inadequate under Rule 23(a) to represent members of the settlement class, because the class included members who were also included in statewide classes certified for litigation. Pet. App. 4a. This holding is, in part, based upon the flawed holding, discussed above, that settling plaintiffs and their counsel were "disarmed" under *Amchem*. For reasons discussed at length by Petitioners, however, this holding is also based upon an analysis of the adequacy requirement that ignores the purpose of the requirement and conflicts with this Court's precedent in *Amchem, Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), as well as precedent from the Tenth Circuit in *Rutter & Wilbanks, supra*, and the Third Circuit in *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220 (3d Cir. 2002).

As Petitioners correctly argue, this Court and other Circuits have consistently held that "adequacy of representation is determined through a case-specific inquiry into whether there is evidence of collusion or some other concrete conflict between the interests of the named plaintiffs and those of absent class members." Pet. 23. The Seventh Circuit decision not only conflicts with these holdings, but ignores the district court's own finding, after extensive discovery and briefing on the issue and review by a court-appointed special master, that there was "no evidence of collusive negotiations in this case." Pet. App. 10a (Cudahy, J., dissenting).

The Smith Respondents agree with and adopt the core argument of Petitioners that the Seventh Circuit decision conflicts with controlling precedent of this Court and other Circuits on this important issue. Conflicting precedent concerning the propriety of settlement classes that encompass subclasses certified for litigation creates a significant obstacle to class action settlements in a large category of cases. In addition, the standard for adequacy of representation in settlement class certification should be clarified. For these additional reasons, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SPRINT COMMUNICATIONS COMPANY, L.P., *et al.*,
Petitioners,

v.

WAYNE SMITH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

This case presents two distinct but related questions of fundamental importance to the fair and practical resolution of complex nationwide litigation: (1) May a class be certified for settlement if an equivalent class could not be certified for litigation? (2) Can the named representatives of a settlement class satisfy the "adequacy" requirement of Federal Rule of Civil Procedure 23(a) when the class includes members of competing litigation subclasses? In a decision that conflicts with decisions of this Court and two other Circuits, a divided Seventh Circuit panel answered "no" to both questions.

Respondent Chem-Tronics, Inc. ("Chem-Tronics") does not directly deny the decisional conflicts created by the majority's opinion below. Chem-Tronics rests its opposition to certiorari on two other grounds. *First*, Chem-Tronics insists that the decision below is "fact-driven" rather than "doctrinal" and thus not worthy of review. Br. Opp. 3-4. *Second*, Chem-Tronics labors to minimize the significance of the dispute by describing it as a mere "handful of state and federal class actions" with no implications for the physical structure of the nation's telecommunications grid. Br. Opp. 1.

These contentions are far off base. The Seventh Circuit's rejection of the class certification order was *not* driven by any facts unique to this case, but by two related *legal* principles that would preclude the certification of settlement classes in virtually *any* case of nationwide scope and complexity. It is thus critically important to the successful resolution of complex civil litigation in this country to determine whether those legal principles have merit – just as it is vital to the efficient operation of the nation's telecommunications grid to determine whether the class certification and settlement in this case is sustainable. Certiorari should be granted.

ARGUMENT

I. THE DECISION BELOW RESTS ON LEGAL PRINCIPLES AT ODDS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

Chem-Tronics' chief objection to review is that the decision below is a "fact-driven" ruling that implicates no legal issues of any consequence. Br. Opp. 3. To be sure, one of the courts below did reach a "fact-driven" result based on the record. But that court was the *district court* – not the Seventh Circuit. The latter plainly reached its result based on two related *legal* principles that it believed flowed ineluctably from this Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). In so holding, the Seventh Circuit placed itself in direct conflict with the decisions of the Third and Tenth Circuits, both of which have explicitly rejected the argument that *Amchem* precludes certification of settlement classes under circumstances materially identical to those presented here.

1. According to Chem-Tronics, the decision below is unworthy of review because it turns on "fact-intensive discretionary rulings" that the settling plaintiffs and their counsel were "hapless negotiating partners"; that neither could "be counted upon to honestly fulfill fiduciary obligations to the class"; and that their "[i]nept and unsuccessful efforts to conduct class proceedings" rendered their representation inadequate. Br. Opp. 3-4.

But such findings are nowhere to be found in the majority decision. The only court that made *any* findings as to the quality, competency, and honesty of the settling plaintiffs and their counsel was the district court, which *specifically* rejected Chem-Tronics' depiction of the settlement's negotiating history. After lengthy review of that history, the district court found that "[t]he Plaintiffs, represented by counsel experienced in complex litigation, will fairly and adequately protect the interests of the Class." Pet. App. 13a. In particu-

lar, the district court affirmed the factual findings of the magistrate judge that "the Plaintiffs' Counsel have also been engaged in genuine litigation efforts against the Settling Defendants" and that there was no "basis for concluding that the Settling Defendants chose to negotiate with the Plaintiffs' Counsel because the Settling Defendants believed that the Plaintiffs' Counsel could not or would not effectively represent the class" – in short, that this case was "not remotely like" the collusive bargaining situation portrayed by Chem-Tronics. Pet. App. 25a.

The Seventh Circuit's decision fails even to *mention*, let alone reject, any of those factual findings as to the adequacy of the settling plaintiffs as class representatives. *See Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 857 n.20 (1982) ("If the Court of Appeals disagreed with the District Court's factual findings, it should not have dismissed them without finding them clearly erroneous."). Indeed, the only substantive discussion of the district court's findings is found in Judge Cudahy's *dissenting* opinion, which contrasts the district court's careful Rule 23 findings with the majority's categorical rejection of the settlement class certification order. Pet. App. 7a-8a (Cudahy, J., dissenting).

Far from being "fact-intensive" (Br. Opp. 4), the majority's opinion reflects a broad legal judgment about settlement class certification, which rests on just two general "facts" that are simply commonplace realities of complex litigation. First, Kansas and Tennessee landowner groups had already been certified as statewide litigation classes with the theoretical potential for monetary recoveries greater than they would receive in the nationwide settlement. Pet. App. 4a. Second, a similar nationwide litigation class had been rejected in *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001), and thus the settling plaintiffs "entered negotiations in what the *Amchem* court describes as a 'disarmed' state." Pet App. 4a. That is the sum total of the Seventh Circuit's ade-

quacy analysis – nothing more. Pet. App. 8a (Cudahy, J., dissenting) (majority opinion rests on "one-paragraph disparagement of a related class action in *Isaacs*"). From those two general "facts" – both of which will be present in virtually any complex litigation nationwide in scope – the majority's opinion leaps to the conclusion that a nationwide settlement class cannot be certified as a matter of law, *despite* the district court's unrefuted factual findings as to the adequacy of the settling plaintiffs as class representatives.[1]

2. It is that categorical legal conclusion that gives rise to

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[1] In an attempt to defend the Seventh Circuit's decision on factual grounds irrelevant to the majority's actual opinion, Chem-Tronics falsely states that "the record below was that the settling plaintiffs had abandoned the prosecution of most of their cases at an early date." Br. Opp. 2. The record below showed no such thing, as the district court recognized in finding the Heins group plaintiffs to be adequate representatives. In fact, at the time the Heins group plaintiffs began negotiations with defendants in the fall 2000, they had numerous advanced cases pending against all petitioners and were clearly the most "well armed" plaintiffs' group. Chem-Tronics, by contrast, had only one case pending against one petitioner, and a class was not certified in that case until *after* the Heins group began negotiations. (Chem-Tronics' counsel had one other case pending against one other defendant, and class certification in that case had been denied. *Hallaba v. Worldcom Networks Servs., Inc.*, 196 F.R.D. 630 (N.D. Ok. 2000)). Development of the Heins cases was stayed when a settlement was reached in 2001, but at no point did the Heins group plaintiffs abandon prosecution of their cases.

Chem-Tronics also misleadingly states that the settling plaintiffs "were rejected as class representatives on the rare instances when the issue was broached." Br. Opp. 2. The cited opinion, *Chambers v. Sprint Corp.*, 2002 U.S. Dist. LEXIS 22621 (W.D. Wis. March 2, 2002), says nothing at all about the issue; the companion opinion that is actually relevant discusses adequacy only in the context of rejecting a *litigation* class on grounds – primarily the individualized nature of the claims – that are not necessarily applicable in the settlement-class context, for all the reasons we have elaborated. *See* Opinion and Order, March 2, 2001, at 20-21, *Chambers v. MCI WorldCom Network Servs., Inc.*, No. 00-C-348-C (W.D. Wis.). The opinion in no way suggests that the named plaintiffs were anything other than vigorous adversaries of the petitioners.

the questions presented here. Beyond its mischaracterization of the decision below as "fact-driven," Chem-Tronics has almost nothing to say in opposing review of those questions.

a. The first question is whether the Seventh Circuit erred in holding that a settlement class cannot be certified where, as here, an equivalent litigation class could not be certified. Pet. 13-15. As to this question, Chem-Tronics merely adverts to the fact that one of the petitioners opposed certification of the litigation class in *Isaacs*. Br. Opp. 2, 3. This badly misses the point: *Isaacs*' rejection of a *litigation* class merely raises the question whether a *settlement* class still could be certified, it does not answer that question. Pet. 13-14. Other than its reference to *Isaacs*, Chem-Tronics simply ignores the first question presented – and thereby ignores this Court's holding in *Amchem* that some classes that could *not* be certified for litigation purposes *may* be certified for settlement purposes, 521 U.S. at 620,[2] and the decisions of the Third and Tenth Circuits affirming settlement class certification orders where, as here, an equivalent litigation class could not be certified. Pet. 14-15 (discussing *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004) and *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180 (10th Cir. 2002)). The conflict between those decisions and the decision below should be resolved.

b. The second question presented is whether the named plaintiffs in a settlement class may be deemed conclusively inadequate representatives of the class merely because the class includes competing litigation sub-classes, even absent a finding of collusion or conflict. Pet. 15-25. Chem-Tronics' only response on this point is to attack what it describes as "scoundrelly" and "carnival-like" behavior by settling plaintiffs. Br. Opp. 3, 5. As *both* opinions below demonstrate,

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[2] Indeed, the concerns identified in *Isaacs* related principally to the manageability of litigating the case as a class action, and not to the adequacy of the representatives. *See Isaacs*, 261 F.3d at 682.

these insults are directed at a straw man.

Chem-Tronics' invective centers on an unsuccessful attempt to submit a proposed settlement in a case before the district court in Oregon. Pet. App. 2a-3a. What Chem-Tronics ignores is that the Oregon court refused to entertain the settlement explicitly out of deference to the Illinois district court, given the work and resources the latter court had already invested to address "objections raised by the intervenors" and to establish "a fair process to analyze the proposed settlement." *Zografos v. Qwest Communications Corp.*, 225 F. Supp. 2d 1217, 1222 (D. Or. 2002). Following the subsequent submission of the settlement to the Illinois district court,[3] that court engaged in lengthy and detailed scrutiny of both the terms of the settlement and the nature of the negotiations – just as the Oregon court had anticipated in declining to exercise its own jurisdiction. And after careful consideration of the various objections and grievances of Chem-Tronics and other intervenors, the Illinois district court rejected them all. The district court thus recognized, in other words, that the Oregon submission was simply irrelevant to the questions ultimately before it: were the requirements of Rule 23 satisfied given the settlement, and was the settlement fair? And although the court of appeals' majority described the history of the case as "troubled," Pet. App. 2a, it too apparently understood that the Oregon submission was irrelevant to proper analysis of those dispositive questions: the majority's *legal* discussion of the merits of the class certification order *completely ignores the Oregon filings*. Pet. App. 4a-5a.

Again, it is that legal discussion that comes before this Court – Chem-Tronics' consistently rejected allegations of

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[3] Contrary to the implication in both Chem-Tronics' opposition and the decision below, the parties did *not* move for preliminary approval of the proposed settlement in the Illinois district court before moving in the pending Oregon case.

collusion and conspiracy are a diversionary sideshow. But Chem-Tronics' brief does unwittingly illustrate a systemic problem created by the decision below. As Chem-Tronics all but admits (Br. Opp. 3), Chem-Tronics would object to *any* settlement of this complex dispute on terms not dictated by Chem-Tronics itself. As a practical matter, this dynamic will exist in almost all disputes of nationwide scope: *somebody* will resist settlement on all but the most one-sided terms. The purpose of Rule 23(e) is to establish a process by which the district court can hear such objections, and then ultimately rule as to whether the settlement, despite necessary compromises, is fair overall to the entire class. As this case demonstrates, however, Rule 23(e) fairness objectors can also frame their challenges as Rule 23(a) "adequacy" objections – "the settling plaintiff is not doing things my way, so he is not adequately representing my interests." For good reason, Rule 23(a) has never been understood this way; this Court and others have made clear that the "adequacy" inquiry turns on whether the interests of the named plaintiffs are aligned with those of the class members or whether there is actual collusion between the named plaintiffs and the defendants. Pet. 16-19, 23-24.

The decision below supplants that inquiry with a conclusive presumption that settling plaintiffs are not "adequate" representatives of class members already in pending litigation subclasses – even absent objectively conflicting interests, and even absent collusion with the defendants. Not only does that holding conflict with the general rule, it conflicts with the *specific* holdings of the Third and Tenth Circuits that the presence of competing litigation subclasses does *not* categorically preclude the certification of a nationwide settlement class, absent proof of actual collusion between the settling plaintiffs and the defendants. Pet. 20-23 (discussing *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220 (3d Cir. 2002), *Warfarin*, and *Rutter & Wilbanks*). Yet again, Chem-Tronics flatly ignores the circuit conflict. It

should be resolved.

II. THIS CASE IS IMPORTANT BECAUSE OF THE PRINCIPLES AT STAKE AND BECAUSE OF THE CONTEXT IN WHICH THEY ARISE

The petition demonstrated that, on top of the decisional conflicts it generates, the decision below implicates judicial administration and telecommunications policy concerns of the utmost importance. Chem-Tronics' responses again miss their marks.

1. In terms of the legal issues at stake, Chem-Tronics' response is bound up in its misunderstanding of the Seventh Circuit's decision as routine, fact-intensive, and non-doctrinal. That error is addressed above and need not be rehearsed here. Suffice it to say that the status of settlement class certifications in the wake of *Amchem* and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815(1999), is highly confused and much debated,[4] but nobody disputes that settlement class certifications *must* play a significant role in the fair and expeditious resolution of complex civil litigation – especially civil disputes nationwide in scope.

2. This case is an ideal vehicle for clarifying the role and status of settlement class certification procedures because it well illustrates exactly the type of circumstances in which the settlement class certification device *should* be employed: it is a major nationwide dispute, involving scores of different actions in dozens of states, with potential consequences for millions of Americans not directly party to the cases. Pet.

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[4] *See, e.g.*, Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 Vand. L. Rev. 1687, 1713-17 (2004); Richard A. Nagardeda, *Administering Adequacy in Class Representation*, 82 Tex. L. Rev. 287, 317-29 (2003); Elizabeth J. Cabraser, *Class Action Update 2002: Mass Tort Trends, Choice of Law Rule 23(f) Appeals, and Proposed Amendments To Rule 23*, Civil Practice and Civil Litigation Techniques in Federal and State Courts at 1200-02 (2002).

27. It cannot seriously be doubted that a conclusive, comprehensive, fair resolution of this dispute is to be preferred over the "expensive and lengthy chaos" continuing litigation of these claims will necessarily entail. Pet. App. 7a (Cudahy, J., dissenting).

Chem-Tronics offers only two responses. First, Chem-Tronics suggests – without evident irony – that this dispute is comparatively modest, involving only a "relative handful of state and federal class actions." Br. Opp. 1. But even if accurate, that characterization only *amplifies* the case for review: if 42 cases in 32 state and federal courts constitutes only a "relative handful" of actions, then the federal and state court systems must be swamped with a tide of litigation involving overlapping and duplicative class actions revolving around the same core disputes. And of course that is exactly what is happening. Pet. 26 & n.4. The parties and courts struggling under the weight of such a wasteful litigation process deserve clarification of the rules governing the comprehensive settlement of these disputes.

Second, Chem-Tronics denies that the many overlapping cases involved pose any concerns for users of the nation's telecommunications grid, as Judge Cudahy's dissent warns. Pet. App. 5a. It is "arrant nonsense," Chem-Tronics pronounces, to suggest that any of the actions seek the physical removal of the fiber-optic cables that give life to the grid. Br. Opp. 1. That claim is baffling: the removal of cables is *exactly* the remedy sought in many actions – *including at least two filed by Chem-Tronics' own counsel.*[5] Even more

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[5] *See, e.g.*, Second Am. Class Action Compl. at 14, *Smith v. Sprint Communication Co.* (N.D. Ill. filed Sept. 4, 2002) (No. 99c3844) (requesting that "Defendants be ordered to remove the fiber optic cable and related hardware from the railroad rights of way"); Compl. at 14, *Carrubba v. Worldcom, Inc.* (S.D. Miss. filed July 12, 2001) (No. 1:02cv282) (requesting "an injunction requiring Defendants to remove their fiber optic cables from Plaintiffs' land and to restore that land to its former condition"); Am. Class Action Compl. at 8, *Hord v. Qwest Com-*

important, Chem-Tronics simply ignores the distinct policy harms caused by the Seventh Circuit majority's decision to remit the parties to their litigation alternative. Litigation of these cases began more than 15 years ago and, in the absence of a comprehensive settlement, there is no end in sight. Instead of the fair and final resolution achieved by the settlement below, the future holds only a "nightmare of complexity," Pet. App. 5a (Cudahy, J., dissenting), which will be detrimental not only to the parties and courts involved in these actions, but to all citizens affected by the nation's telecommunications infrastructure. Especially given that infrastructure's "important value for the national economy as well as for national security," *id.*, there is no good reason to continue down this path, and every reason not to.

CONCLUSION

The petition for a writ of certiorari should be granted.

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munications Int'l, Inc. (Cir. Ct. Tenn. filed Mar. 24, 2005) (No. 40084) (requesting an order "ejecting the defendants from the property of the class members and requiring them to remove all their fiber optic conduit, cable and other equipment"); Class Action Compl. ¶ 39, *Kirkman v. Norfolk Southern Rwy Co.* (M.D.N.C. filed Aug. 7, 2001) (No. 01cv00850) (stating that the "Named Plaintiff and the Class members are entitled either to injunction for removal of the fiber optic cable or permanent monetary damages for the value of the easement taken by Defendants"); Compl. at 7, *Hallaba v. Wordcom Network Servs., Inc.* (N.D. Okla. filed Nov. 24, 1998) (No. 98-CV-895-H) (Chem-Tronics' counsel) (requesting that defendant be "preliminarily and permanently enjoined from trespassing upon the lands of the plaintiffs and members of the plaintiff Class to use and maintain their fiber optic cables"); Class Action Compl. at 12, *McDaniel v. Qwest Communications Corp.* (N.D. Ill. filed Feb. 18, 2005) (No. 05c1008) (Chem-Tronics' counsel) (same); First Am. Class Action Compl. at 18, *Nelson v. MCI Worldcom Network Servs., Inc.* (C.D. Cal. filed Nov. 26, 2001) (No. 01-08205) (requesting that the court issue an order "permanently enjoining defendants, and each of them, from operating and maintaining fiber optic cable on the Named Plaintiffs and Class member land without their consent").

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IN THE

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P., *et al.*,

Petitioners,

v.

WAYNE SMITH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF ASSOCIATION OF AMERICAN RAILROADS TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2(b), the Association of American Railroads requests leave to file the accompanying brief as *amicus curiae* in support of the Petition for a Writ of Certiorari. While Petitioners Sprint Communications Co., Qwest Communications Corp., and Level 3 Communications L.L.C. have consented to the filing of this brief, Petitioner WilTel Communications L.L.C., Respondents Chem-Tronics, Inc., Daniel R. Buhl, Joe C. Meighan, Charles W. Hord and Joy Pratt-Hord, and counsel for plaintiffs (respondents "by rule" under Rule 12.6 of the Rules of this Court) have withheld consent, necessitating the filing of this motion.[1]

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole – and in those instances such requests have been granted.[2]

The railroad industry has a strong interest both in preserving the fair national settlement approved by the district court in this case and in having this Court definitively interpret Rule 23 to facilitate national settlements in other, poten-

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[1] Letters from Petitioners Sprint Communications Co. L.P., Qwest Communications Corp., and Level 3 Communications L.L.C.granting consent to the filing of an *amicus curiae* brief by the Association of American Railroads have been lodged with the Clerk of the Court.

[2] *E.g., Consol. Rail Corp. v. Richards*, 540 U.S. 1096 (2003); *Nat'l R.R. Passenger Corp. v. Griesser*, 534 U.S. 970 (2001); *Kansas City S. Ry. Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 U.S. 958 (1996); *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). All granting motion of AAR to participate as *amicus curiae*.

tially similar class action litigation. Consistent with its goals, and the interests it is intended to protect, Rule 23 should be construed to permit global resolution of class actions involving integrated, national industries. The alternative–an outcome which inevitably flows from the decision below–of requiring protracted, state-based, multiple class action lawsuits to resolve such disputes, presents a scenario that is at odds with the fundamental policy that has consistently guided Congressional treatment of railroads: that uniformity best promotes a safe and efficient rail network. Indeed, the admonishment of the dissenting judge, that the majority opinion "imprudently reject[s] the preferred treatment of this nationwide infrastructure,"[3] though referring to the telecommunications industry, resonates loudly with the nation's railroads.

As Petitioners point out, the Seventh Circuit's holding in this case is "tantamount to a rule that [complex nationwide litigation] may never be settled in any comprehensive efficient manner." Pet. for Cert. at 27. Thus, if allowed to stand, this holding not only will impact the settlement in this case, but could well have ramifications for the railroad industry in the future in the eventuality that railroads become ensnared in other litigation that is susceptible to class treatment. Most assuredly, the Seventh Circuit's holding will relegate the resolution of similar complex litigation to multiple state-based class actions, with plaintiffs pursuing different state law remedies. From the standpoint of the railroads, this invites application a patchwork of state rules and policies, an approach which Congress has generally found unsuitable.

Inasmuch as the requirements of Rule 23 have been met in this case, AAR agrees with petitioners that class certifica-

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[3] *Smith v. Sprint Communications Co.*, 387 F.3d 612, 618 (7th Cir. 2005) (Cudahy, J., dissenting).

tion for the purpose of settlement was appropriate, and the erroneous ruling of the Seventh Circuit warrants review. To be sure, some members of AAR have a direct interest in resolving this litigation.[4] However, of even greater importance is preserving the option, apparently foreclosed by the ruling below, of resolving future complex commercial disputes that might involve multiple railroads through a nationwide class action settlement. Significantly, preserving such an option would be consistent with the long-standing public policy that demands consistent, uniform rules applicable to railroads. Therefore, the railroads urge this Court to review the decision below, which would, as Judge Cudahy noted in his dissent, "forfeit[] the manifest advantages of a national settlement for a national undertaking." *Smith v. Sprint Communications Co.*, 387 F.3d 612, 617 (7th Cir. 2005) (Cudahy, J., dissenting).

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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[4] Union Pacific is a defendant in 11 similar fiber optic class action lawsuits in federal and state court, eight of which are subject to the national settlement reached below. Burlington Northern Santa Fe Railway Co. and CSX Transportation, Inc. each are defendants in seven similar fiber optic class action lawsuits in federal and state court, and Norfolk Southern Railway Co. is a defendant in two similar lawsuits in federal and state court.

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Dated: May 16, 2005

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak.[1] AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest. AAR submits briefs *amicus curiae* in cases that raise an issue of great significance to the railroad industry as a whole.

This case involves the nation's modern communications infrastructure, which in large part runs along the nation's rail infrastructure. When the telegraph emerged as a major communications provider in the 19th Century, a business described as the "Victorian internet,"[2] many telegraph lines followed the railroad right of way and became an integral part of transcontinental railroad operations. The telegraph gave way to the new technology of the telephone, and now, in the 21st Century, the railroads communicate across the country on the internet or through telecommunications equipment. The modern voice and data internet is based on fiber optics instead of wires, but, like its predecessor, it generally follows the railroad rights-of-way to create a nationwide, transcontinental network.[3]

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[1] In accordance with Rule 37.6, *amicus curiae* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus* and its members, has made a monetary contribution to the preparation or submission of this brief.

[2] *See* Tom Standage, *The Victorian Internet: The Remarkable Story of the Telegraph and the Nineteenth Century's On-Line Pioneers* (Walker & Co. 1998).

[3] *See Mellon v. S. Pac. Transport Co.*, 750 F. Supp. 226, 230 (W.D. Tex. 1990) (installation of fiber optic cable in railroad right of way "is the modern application of its antecedent the telegraph line").

The railroad industry has a strong interest both in preserving the national settlement approved by the district court in this case and in having this Court definitively interpret Rule 23 consistently with its underlying public policy purposes to facilitate national settlements in other potentially similar class action lawsuits involving integrated, national industries. The decision below would reach the opposite result, relegating this case and other controversies impacting nationwide businesses to adjudication in protracted and burdensome litigation in multiple jurisdictions.

A number of AAR members have a direct interest in this litigation, as they will be included among the Right of Way providers released from the claims if the national settlement is upheld.[4] Similar fiber-optic class action suits are pending but are not currently subject to the national settlement. However, of even greater importance to *amicus* is preserving the option, apparently foreclosed by the ruling below, of resolving future complex commercial disputes that might involve multiple railroads through a nationwide class action settlement. Significantly, preserving such an option would be consistent with the long-standing public policy that demands consistent, uniform rules applicable to railroads.

STATEMENT OF THE CASE

Amicus adopts and incorporates Petitioners' statement of the case.

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[4] Union Pacific is a defendant in 11 similar fiber optic class action lawsuits in federal and state court, eight of which are subject to the national settlement reached below. Burlington Northern Santa Fe Railway Co. and CSX Transportation, Inc. each are defendants in seven similar fiber optic class action lawsuits in federal and state court, and Norfolk Southern Railway Co. is a defendant in two similar lawsuits in federal and state court.

SUMMARY OF ARGUMENT

Class action practice developed to promote the efficient administration of justice while being mindful of the interests of the individual parties. The Seventh Circuit's decision below both disregards the public policy underpinnings of Rule 23 and misconstrues this Court's jurisprudence regarding the settlement of class actions.

In rejecting the settlement class on the ground that plaintiffs' counsel were somehow "disarmed," the appeals court also overlooked a well-known aspect of trial practice: the immense power that the threat of multiple class action lawsuits gives class counsel as they engage in settlement discussions. The Seventh Circuit's apparent failure to note the potential impact of class certification on settlement negotiations is mystifying, given that Judge Posner of that court eloquently described this impact fifteen years ago as forcing defendants into "blackmail settlements." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

Even if there were any doubt that this settlement class should be approved, which there is not, the federal interest in maintaining a uniform and thriving transcontinental telecommunications/railroad network and the associated interstate commerce issues strongly support facilitating the federal class action settlement.

Guidance from the U.S. Supreme Court regarding the approval of a settlement class under these circumstances is badly needed. For these reasons, *amicus curiae* respectfully requests that the Petition for Writ of Certiorari be granted.

ARGUMENT

I. THE HISTORY AND PUBLIC POLICY UNDERLYING CLASS ACTION PRACTICE SUPPORTS CERTIFICATION OF A NATIONWIDE SETTLEMENT CLASS.

A. Since Their Inception, Class Action Rules Have Been Intended To Enhance The Efficient Administration of Justice.

Class action practice developed to promote efficiency and avoid waste in the resolution of legal claims. In recent years, class action abuse has resulted in excessive, often duplicative lawsuits and unnecessary expense to litigants, the judicial system and the public at large.[5] These developments underscore the need for courts to be mindful of the doctrine's underlying purpose when they resolve questions about certification of both litigation and settlement classes.

The doctrine's purpose of promoting the efficient administration of justice was set forth as early as 1833, when the federal courts adopted their first provision on group litigation, Equity Rule 48.[6] It continued to support group action rules throughout their various iterations, including a significant rewrite of class action rules in the adoption of the first version of the Federal Rules of Procedure in 1938.[7] The

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[5] *See* S. Rep. No. 109-14, at 4-27 (2005) (discussing numerous abuses of class action rules and the Class Action Fairness Act of 2005).

[6] Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 10 (2000) (stating that Equity Rule 48 allowed for representative actions "when the parties on either side were too numerous for convenient administration of the suit.").

[7] *See id.* at 10-11 (discussing overhaul of Equity Rules in early 20th century; Equity Rule 38 continued to allow for group actions "[w]hen the question is one of common or general interest to many persons constitut-

learned U.S. Second Circuit of Appeals Judge Charles E. Clark, Reporter to the original Advisory Committee on Rules and the "principal architect of the Federal Rules of Civil Procedure,"[8] explained at the time that class certification in appropriate cases "saves time and expense for the litigants and the courts; it represents the difference between a single and permanent surgical operation as compared to chronic physicking."[9] The intent to enhance efficiency and consistency in litigation results similarly underscored the substantial revision of Rule 23 in 1966.[10]

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ing a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.").

[8] *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 297 (1973).

[9] Charles E. Clark, *The New Rules of Federal Civil Procedure: The Last Phase – Underlying Philosophy Embodied in Some of the Basic* Provisions *of the New Procedure*, 26 Am. Bar Ass'n J. 976, 977 (1937) (also noting that "[e]ven from the standpoint of the court records, of simplifying and reducing the permanent history of litigation, there is a gain.").

[10] *See* James M. Underwood, *Rationality, Multiplicity and Legitimacy: Federalization of the Interstate Class Action*, 46 S. Tex. L. Rev. 391, 418-19 (2004). Unfortunately, the 1966 revision of Rule 23 had the opposite effect than intended, primarily due to the switch from an "opt in" to an "opt out" requirement for members of damages classes. *See id.* Class action litigation exploded in the years following the Rule 23 revisions, and soon became the subject of abuse. *See* Report of the Judicial Conference Committee on Rules of Practice and Procedure 8 (Sept. 2002) ("[I]n the now almost 40 years since [the 1966 amendments], Rule 23 has figured prominently in the explosive growth of large-scale group litigation in federal and state courts . . . ."); Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483 (2000) (discussing opportunities for and instances of class action abuse).

B. The National Class Settlement Would Resolve These Claims Efficiently and Uniformly While Safeguarding the Interests of All Litigants.

Approval of the settlement class would provide the efficient and uniform resolution of legal claims envisioned by the drafters of Federal Rule 23. First, the settlement would end years of expensive, protracted litigation in 32 state and federal jurisdictions, providing agreed-upon compensation to the plaintiffs and allowing defendants to invest their resources in such things as research and development of new and improved consumer and business technologies instead of in legal fees.

Next, as a national settlement of disputes involving a still-developing nationwide industry, approval of the settlement class would provide uniformity and certainty to the defendant companies as to their legal rights and obligations, allowing them to most effectively plan ahead to grow their businesses. This predictability would extend to the defendants' existing and potential business partners, who would be able to advance their own business plans accordingly.

In short, if the Court does not uphold the certification of this nationwide settlement class, the resulting piecemeal state court lawsuits will delay the resolution of the class members' claims, in all likelihood for years, in exactly what Judge Clark likened to "chronic physicking." Individual federal and state class actions will unnecessarily increase the litigation costs to the parties, the courts and the public. In addition, these additional costs will likely be passed on to consumers or taxpayers in higher prices, taxes and fees.

Approving the settlement class will further Rule 23's fundamental goal of the efficient administration of justice – without interfering with the rights of the litigants.

C. The Different Balancing of Interests Required Militates Against Linking Settlement Class Certification to the Availability of Litigation Class Certification.

Courts considering certification issues are to consider the individual interests of the litigants on each side of the case, as well as the interests of the public and courts in an efficient, timely and cost-effective justice system. The approach to balancing all of these interests varies, depending on the dynamics of a case and whether certification is sought for a settlement class or a litigation class. Because of the different weighing of the interests involved, the inability to obtain certification of a litigation class should not affect the ability to obtain certification of a settlement class.

For example, unlike courts handling motions for certification of litigation classes, a court faced with a request for settlement-only certification "need not inquire whether the case, if tried, would present intractable management problems [under Rule 23(b)(3)(D)], for the proposal is that there be no trial." *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Similarly, where, as here, the plaintiff class and the defendants have reached a settlement after years of costly litigation, there should be no need to conduct a hypertechnical analysis of the Rule 23 commonality and predominance requirements. Instead, the court should consider whether the material questions of fact and law in the case create "sufficient unity for settlement class certification purposes." *Smith v. Sprint Communications Co.*, 387 F.3d 612, 618 (7th Cir. 2004) (Cudahy, J., dissenting). In this way, a court has the flexibility to appropriately balance the interests of different parties, achieving the parties' explicit interests in a uniform, final and comparatively economical resolution of their legal claims, and carry out the Rule's interest in the efficient administration of justice.

A proposal for a nationwide settlement class can pass this balancing test, even though a proposal for a nationwide litigation class in the same case would rightly fail. For example, in another fiber optics case, Judge Posner overturned an order certifying a litigation class where the district judge failed to conduct a rigorous analysis of certification issues before certifying the class. *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001). Judge Posner wrote: "The rule could not be clearer, and this is hardly a case in which class action treatment is obviously appropriate. Quite the contrary, it seems decidedly inappropriate." *Id.* at 682.

First, Judge Posner noted that "the case involves different conveyances by and to different parties made at different times over a period of more than a century (railroading began in the United States in the 1830s)." *Id.* at 682. Second, those conveyances occurred "in 48 different states (plus the District of Columbia) which have different laws regarding the scope of easements." *Id.* (citations omitted). Furthermore, the court found that the myriad applicable laws "have changed over the period embracing the grant of property rights to railroads." *Id.* (citation omitted). Finally, the court stated that the "application [of those laws] involves intricate legal and factual issues illustrated by *Davis v. MCI Telecommunications Corp.*, 606 So. 2d 734, 737 (Fla. App. 1992) (per curiam), making it unlikely that common issues predominate over individual-claim issues." *Id.* In summary, the Seventh Circuit concluded, "This is a nightmare of a class action." *Id.*

The "nightmare" described by Judge Posner arises out of the difficulty of managing the litigation and trial of class actions that require determination of such numerous and different factual and legal issues under the laws of 49 jurisdictions, and the application of the law to the facts. In just one example of such difficulties, "the court would face an impossible

task of instructing a jury on the relevant law." *Harding v. Tambrands*, 165 F.R.D. 623, 630 (D. Kan. 1996). Such a complicated approach would significantly delay resolution of the parties' disputes while creating high legal costs and tying up the financial and personnel resources of the court.

In contrast to the *Isaacs* case, Judge Cudahy explained that problems associated with the need to litigate a wide variety of factual and legal issues would not plague the certification of a settlement class in the present case:

> Plaintiffs' and all class members' claims arise from defendant's installation and maintenance of fiber-optic cable on railroad rights of way. Any harm rising from that installation has occurred and is capable of being ascertained. All class members also raise the same legal claims. Therefore, the class has sufficient unity for settlement class certification purposes.

Smith, 387 F.3d at 618.

Indeed, the Third and Tenth Circuits are in disagreement with the Seventh Circuit regarding the ability of courts to certify a settlement class where certification of a litigation class would be inappropriate. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 319 F.3d 516 (3rd Cir. 2004) (upholding certification of settlement class that posed potential for "intractable management problems" if case were to proceed to litigation); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180 (10th Cir. 2002) (upholding certification of settlement class where certification of litigation class was twice denied); *see also* Pet. for Writ of Cert. at 13-15. The Court's direction in resolving this split of authority is needed.

II. THE SETTLEMENT CLASS CERTIFICATION CANNOT BE OVERTURNED ON THE GROUND THAT PLAINTIFFS AND THEIR COUNSEL WERE PURPORTEDLY "DISARMED."

The Seventh Circuit's opinion below misconstrues this Court's comments regarding "disarmed counsel" in *Amchem*, as controlling consideration of the adequacy of a proposed class settlement. As Judge Cudahy explained in his dissent below, *Amchem* does not stand for this proposition. *Smith*, 387 F.3d at 615. Rather, the concept of "disarmed" counsel is used as simply *one reason* why the commonality and the other requirements under Rule 23(a) and Rule 23(b) are to be considered in a settlement class.[11]

Even more surprising is that the appeals court chose to characterize the class plaintiffs and their counsel in this settlement negotiation as "disarmed" because the federal class could not be certified for litigation. These parties are entangled in numerous state class action lawsuits and other federal class action lawsuits that would proceed absent approval of the federal nationwide settlement class and the accompanying stay of competing claims. The Seventh Circuit has long recognized the practice of forcing defendants into what Judge Posner called "blackmail settlements" through the filing of one, not to mention multiple, class action lawsuits, which are costly to defend and carry the risk of crushing damages awards if challenged at trial. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1299 ("[Class action defendants] may not wish to roll these dice. That is putting it mildly. They

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[11] *Amchem*, 521 U.S. at 621 ("[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and the court would be disarmed."); *accord id.* at 601 (noting that *Amchem* "exclusively involv[ed] plaintiffs *without* already pending lawsuits").

will be under intense pressure to settle.").[12]

In fact, there is a real threat of massive state-by-state litigation if the national settlement class is not approved, particularly in light of the potential for the award of punitive damages in certain jurisdictions. This is illustrated by the past practices of a few high-profile plaintiffs' lawyers who have threatened to file massive class action or coordinated lawsuits throughout the country, with the apparent intention of forcing "blackmail settlements" from various industries.

For example, a well-financed group of plaintiffs' counsel sought to "bring the entire lead paint industry to its knees"[13] through state-sponsored lawsuits nationwide. Most of these suits have themselves buckled – but obtaining dismissal resulted in substantial (i.e., costly) briefing and argument on the part of the defendants.[14] In another example, a group of similarly well-financed plaintiffs' lawyers announced that they planned to file coordinated class action lawsuits against health maintenance organizations to "level the playing field"

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[12] *Cf. In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (noting opportunities for "legalized blackmail" through class action abuse), *cert. denied*, 516 U.S. 824 (1995); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (characterizing high-pressure class action settlements as "judicial blackmail").

[13] *See* Mark Curriden, *Tobacco Fees Give Plaintiffs' Lawyers New Muscle for Other Litigation*, Dallas Morning News, Oct. 31, 1999 (quoting plaintiffs' attorney in lead pigment litigation).

[14] *See, e.g., City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005); *In re Lead Paint*, No. MID-L-2754-01 (Super. Ct., Law Div., Middlesex County, N.J., November 4, 2002) (dismissing 26 consolidated cases by municipalities); *County of Santa Clara v. Atl. Richfield Co.*, No. CV 788657 (Super. Ct., County of Santa Clara, Cal., July 8, 2003) (dismissing claims by 12 local governments).

between consumers and the HMOs.[15] This announcement was immediately followed by a dramatic plunge in the price of managed care stocks, which subsequently plummeted to half their highs for the year.[16] One plaintiffs' lawyer involved in these primarily federal court suits counseled stock analysts and institutional investors about the potentially disastrous effect that class action litigation could have on prices of managed care stocks.[17] While stating that his goal "is not to simply shake a settlement out of the industry," he told the media: "If HMO investors were smart, they'd lean on their companies to see if we can work something out."[18]

It is clear from these and numerous other examples that plaintiffs' counsel who plausibly threaten the prosecution of multiple class action lawsuits have a significant amount of bargaining power in settlement negotiations. *See* S. Rep. No. 109-14 (2005). Judge Cudahy aptly described the situation in his dissent below: "Far from being the classic disarmed counsel, these counsel have the fabled weapons of mass destruction." *Smith*, 387 F.3d at 616. Even if certification of a settlement class could be defeated simply because class counsel were "disarmed," here, the rhetoric does not match the reality, and intervenors cannot avail themselves of this piquant but inapt characterization.

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[15] Laurie McGinley & Milo Geyelin, *Attorneys Prepare Suits Against HMOs: Class-Action Strategy Used Against Tobacco Industry Is Readied for New Push*, Wall St. J., Sept. 30, 1999, at A3.

[16] *See* Collin Levey, *Three Ways to Shake Down an HMO*, Wall St. J., Jan. 3, 2000, at A19.

[17] *Id.*

[18] *Id.* (quoting Mississippi plaintiffs' lawyer Richard Scruggs).

III. NATIONAL INTERESTS IN INTERSTATE COMMERCE SUPPORT CERTIFICATION OF A SETTLEMENT CLASS.

Amicus agrees completely with petitioners: the requirements of Rule 23 have been satisfied and the nationwide settlement class should be approved. Assuming for the sake of argument that there is a close question about approval of this class, it is appropriate to consider the impact of the case on interstate commerce[19] and national policy.[20]

A nationwide settlement is more consistent with national policy, which typically favors a comprehensive approach to address industries that can only function effectively as an integrated system. Here, a national settlement is likely to encourage the development of transcontinental communications services beneficial to consumers, business and government. On the other hand, potential or actual inconsistent judgments in individual cases may impede the cost-effective development of new communications infrastructure. Thus, the Seventh Circuit's majority opinion, which would compel such a result, "forfeits the manifest advantages of a national

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[19] As Chief Justice Marshall recognized in 1824, the Commerce Clause reflects the substantial federal interest in regulating "that commerce which concerns more States than one" (as opposed to "the exclusively internal commerce of a State"). *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 194-95 (1824).

[20] Historically, when courts have dealt with issues where there was uncertainty in a specific area of the law, they have applied the rule of reason and been guided by fundamental principles of law and public policy. *See* Victor E. Schwartz et al., *Prosser, Wade & Schwartz's Cases and Materials on Torts* (10th ed. 2000). For example, in applying a test for recovery for negligent infliction of emotional distress under the Federal Employers' Liability Act, this Court has underscored the importance of taking into account public policy considerations, such as balancing the right of recovery with the need to avoid "the very real possibility of nearly infinite and unpredictable liability for defendants." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532-545-46 (1994).

settlement for a national undertaking." 387 F.3d at 617 (Cudahy, J., dissenting).

The importance of these considerations is well appreciated by the railroad industry, which is the oldest, most firmly established national undertaking in this country. Though owned, financed and operated by individual, private companies, the railroad network, which dates to the first half of the nineteenth century, is well-recognized as an integral (perhaps the archetypal) instrumentality of interstate commerce. As one federal judge noted, "[f]or years, the industry has played a vital role in many areas including: transportation, communication, gas and electric and many other public needs."[21]

Congress has long favored uniform, national regulation of railroads as the most effective means of promoting efficient and safe operations, beginning with the Interstate Commerce Act[22] and the Safety Appliance Acts[23] of the nineteenth century. This Court, and the lower courts, consistently have supported a consistent national approach to rail regulation, and have rejected the piecemeal application of state law. This policy has been confirmed more recently by

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[21] *Hynek v. MCI WorldCommunications, Inc.*, 202 F. Supp. 2d 831, 838 (N.D. Ind. 2002) (citing Danya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-To-Trails, Utility Licenses, And The Shifting Scope of Railroad Easements From the Nineteenth to the Twenty-First Centuries*, 27 Ecology L. Q. 3561,461 (2000)).

[22] Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (Feb. 4, 1887) (giving Interstate Commerce Commission broad authority to regulate practically every aspect of railroad operations).

[23] *See, e.g.*, Safety Appliance Act, ch. 196, 27 Stat. 531 (Mar. 2, 1893) ((formerly codified as amended at 45 U.S.C. §§ 1-16, now codified at 49 U.S.C.§ 20301 *et seq.*) (first in a series of railroad safety statutes; establishing uniform national standards for "safety appliances" on railroad cars).

enactment of the Federal Railroad Safety Act[24] and the Interstate Commerce Commission Termination Act,[25] and manifests Congress' belief that solutions to disputes involving national industries typically are most effective if applied in a uniform manner. Here, where the purposes of Rule 23 are otherwise met, solutions of this nature should be encouraged, not precluded.

In this case, the public at large would be likely to benefit from a national settlement that provides finality to these lawsuits and encourages future developments in the communications industries. Encouraging the expansion of broadband communications will benefit smaller communities as well as major cities, which in turn will allow significant developments in medicine, law enforcement and education. For example, in newly developing procedures made possible in part by developments in communications technologies, doctors have performed surgery on patients who are hundreds of miles away by controlling robotic arms from a computer console.[26]

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[24] Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971 (Oct. 16, 1970) (codified as amended at 49 U.S.C. § 20101 *et seq.*) (comprehensive nationwide regulation of railway safety).

[25] Interstate Commerce Commission Termination Act,. Pub. L. No. 104-88, 109 Stat. 803 (Dec. 29, 1995) (codified at 49 U.S.C. § 10101 *et seq.*) (manifesting Congressional intent significantly to deregulate the railroads while maintaining oversight in the economic sphere).

[26] Michael Gagner, chief of the Department of Laparoscopic Surgery at Mount Sinai Medical Center in New York participated in a U.S. to France surgery in 2001. He said then: "As the technology evolves and becomes available, and wiring is more widespread, it will be useful for telementoring, teaching, and performing rare surgery that requires different expertise. . . . A smaller city could have the help of an expert surgeon just by being connected." D.L. Parsell, *Surgeons in U.S. Perform Operations in France via Robot*, Nat'l Geo. News, Sept. 19, 2001, *available at* www.nationalgeographic.com. *See also* Wright & Hester, *supra*, 27 Ecology L.Q. at 463 (discussing benefits of installation of fiber optic

This litigation can be resolved with no detriment to the parties' rights through approval of the national settlement class approved by the district court below. The important issues in this litigation should not be relegated to numerous individual federal and state courts to decide. Weighing the appropriate trade-offs in cases concerning the national economy and national welfare is unlikely to be accomplished effectively when undertaken by multiple jurisdictions applying a patchwork of laws. This is particularly so when the trade-offs involve benefits that accrue outside the jurisdiction of the forum and detriments that accrue inside the jurisdiction of the forum.[27] Where the litigation implicates national policy, a unified resolution is far preferable.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Association of American Railroads requests that this Court grant the Petition for a Writ of Certiorari in this action.

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cables in railroad easements as including "increased 911 services, emergency communications and linkages, clear and inexpensive long distance services and lower local telephone rates made possible by competition among providers").

[27] *See, e.g., Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991).

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